Supreme Court, U.S.
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No. 96-

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IN THE

Supreme Court of the United States

October Term, 1996

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., RONALD REIMER, KENNETH H. KOGER, CLIFFORD W. SHINSKI, BRENT MESSICK, ROBERT CREW, SHERMAN DREISESZUN, LELAND GERHART, I. I. OZAR, RAYMOND GIFFORD, HARRY S. JONAS, RANDALL M. NAY, FRANK SEBREE, TONY SALAZAR, PHILIP PISTILLI, MICHAEL K. RUSSELL, GAGE & TUCKER, PEAT, MARWICK, MITCHELL & CO., KPMG PEAT MARWICK, ROBERT SPENCE, THOMAS S. MORGAN, co-executor of the estate of FRANK S. MORGAN, MARILYN J, co-executor of the estate of FRANK S. MORGAN, ISABEL A. KIENE, executrix of the estate of RALPH E. KIENE, SHOOK, HARDY & BACON, C. PATRICK McLARNEY, substituted for SHOOK HARDY law firm, BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 17, 1996

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QUESTIONS PRESENTED

1. Whether decisions by federal district courts to exercise 28 U.S.C. § 1367 supplemental jurisdiction over state-law claims, following the dismissal before trial of all federal claims initially conferring jurisdiction, are subject-matter "jurisdictional" decisions that must be reviewed on appeal at the earliest opportunity, even *sua sponte*.

2. Whether abstention principles must be consulted in deciding if a federal district court commits legal error in employing 28 U.S.C. § 1367, in a removal context, to prevent a State from litigating its own solely state-law civil fraud claims in its own courts, where the *Younger* doctrine would bar the issuance of an injunction to achieve that result.

3. Whether 28 U.S.C. § 1446(d), directing a state court to "proceed no further" once a given case is removed to federal court, authorizes federal courts to enjoin continued litigation only of the *removed* case, not of *separate* cases that are legally distinct from the removed case despite their reliance on similar factual allegations.

RULE 29.6 STATEMENT

Petitioner, the Kansas Public Employees Retirement System, is "a body corporate and an instrumentality of the State of Kansas." K.S.A. § 74-4903. It has no parent company or subsidiary.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 17

TABLE OF AUTHORITIES

Cases ***Pages***

Atlantic Coast Line R. Co. v. Bhd. of Locomotive Engineers, 398 U.S. 281 (1970) 9
Brazinski v. Amoco Petrol. Adds. Co., 6 F.3d 1176 (7th Cir. 1993) . 11
Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) 11, 12
Donovan v. City of Dallas, 377 U.S. 408 (1964) 9
Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260 (D.C. Cir. 1995) 11
Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899 (5th Cir. 1975) .. 16
Hagans v. Lavine, 415 U.S. 528 (1974) 15
Kansas Pub. Emps. Retirement Sys. v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994) .. 5
Kline v. Burke Constr. Co., 260 U.S. 226 (1922) 9
Lashawn A. v. Barry, No. 94-7044, 1996 U.S. App. LEXIS 16256 (D.C. Cir. July 9, 1996) (en banc) 13
Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) 16
Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) 12, 13
Shanaghan v. Cahill, 58 F.3d 106 (4th Cir. 1995) 11
Trainor v. Hernandez, 431 U.S. 434 (1977) 14
United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 11, 12, 13
Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) 9
Wright v. Associated Ins. Cos. Inc., 29 F.3d 1244 (7th Cir. 1994) .. 12
Younger v. Harris, 401 U.S. 37 (1971) 9, 10, 14, 15

Statutes, Regulations and Scholarly Materials

12 U.S.C. §§ 1441a(*l*)(1) and 1441a(*l*)(3)(A) 2, 5
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1367 ..... *passim*
28 U.S.C. § 1446(d) 2, 3, 10, 15, 16
28 U.S.C. § 1651 ..... 2, 8
28 U.S.C. § 2283 2
12 C.F.R. § 545.121 5
K.S.A. §§ 60-512, 60-513, 60-521, 60-522 ..... 5, 6
K.S.A. §§ 74-4901, 74-4903 4
Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321 (1990) 15
David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985) 12, 13, 15

OPINIONS BELOW

The decision of the court of appeals (Appendix ("App."), *infra*, 1a-14a) is reported at 77 F.3d 1063. The bench opinions and written order of the district court (App. 16a-35a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 27, 1996. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 18, 1996 (App. 15a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute governing the exercise of supplemental jurisdiction, 28 U.S.C. § 1367, provides in relevant part:

> **§ 1367. Supplemental jurisdiction**
>
> **(a)** Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> * * *
>
> **(c)** The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —
>
> **(1)** the claim raises a novel or complex issue of State law,
>
> **(2)** the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> **(3)** the district court has dismissed all claims over which it has original jurisdiction, or
>
> **(4)** in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1446(d) provides:

§ 1446. Procedure for removal

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

The All-Writs Act, 28 U.S.C. § 1651, provides in relevant part:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

12 U.S.C. § 1441a(*l*)(1) and 1441a(*l*)(3)(A) are reprinted in Appendix F (App. 36a).

STATEMENT OF THE CASE

1. Overview. This civil case was brought in Kansas state court by the State of Kansas, under Kansas law, against citizens of Kansas and other States, seeking recovery on its own behalf for fraud and other state-law torts. As filed, this case could not have been brought originally in federal court or removed to federal court. Nonetheless, it was removed to federal court after defendants (respondents here), in reaction to losing a key motion, filed meritless third-party claims against an entity whose status as a federally chartered corporation authorized it to remove the case.

After the case reached federal court, the third-party claims that provided the basis for removal were dismissed as meritless well before trial. However, instead of then sending the case back to state court and rebuking respondents for pursuing a wasteful jurisdictional gambit, the district court rewarded their machinations by asserting 28 U.S.C. § 1367 supplemental jurisdiction over the remainder of the case. Even more amazing was the district court's reaction when the State of Kansas — after enduring almost three years of federal litigation over various jurisdictional and procedural issues raised entirely by respondents' removal of the case — filed parallel actions in its own courts in August 1995. The district court quickly enjoined the State of Kansas from pursuing in its own courts these or any future related parallel actions, in order to protect the district court's exercise of the removal jurisdiction that it had obtained via the meritless third-party claims.

As a result of these events, the district court below currently holds a jurisdictional monopoly over a type of litigation — civil fraud claims brought solely under state law and pursued by Kansas in its sovereign capacity in lieu of a criminal prosecution — that Congress has never defined as part of the original or the removal jurisdiction of the federal courts, and that has long been protected as the exclusive province of the States. Even so, on appeal from the injunctions entered against the State of Kansas to bar its access to its own courts, the Eighth Circuit affirmed across the board, going so far as to hold that the injunctions were valid *even assuming* that the district court had abused its discretion in refusing to remand under Section 1367(c).

This case presents two basic issues involving Congress's recent codification of supplemental jurisdiction principles in 28 U.S.C. § 1367: whether decisions to *exercise* supplemental jurisdiction are subject-matter "jurisdictional" issues that must be reviewed on appeal at the earliest opportunity, even *sua sponte*; and whether Section 1367, particularly given Section 1367(c)(4)'s "exceptional circumstances" prong, requires that fundamental principles of abstention must be consulted in deciding if the exercise of supplemental jurisdiction is proper. Also at issue in this case, even if the first two issues were not before the Court, is a question that has divided the circuits concerning whether 28 U.S.C. § 1446(d)

authorizes federal courts to enjoin continued litigation only of the *removed* case, or whether it also permits injunctions of *separate* cases that are legally distinct from the removed case despite their reliance on similar factual allegations.

2. Procedural History

This lawsuit was filed in Kansas state court on June 5, 1991, by the Attorney General of the State of Kansas on behalf of the Kansas Public Employees Retirement System ("KPERS"), the State's agency responsible for maintaining and investing its employees' retirement monies.[1] The Attorney General brought the lawsuit to recover $65 million, plus interest, that KPERS lost as the result of alleged fraud and other tortious conduct against KPERS in connection with its 1986 investment in a Missouri-based savings and loan named Home Savings Association.[2] KPERS sued (either originally or in amended pleadings filed on December 23, 1991) various respondents including the former directors of Home Savings, who allegedly made fraudulent misrepresentations to KPERS to induce KPERS to make its investment, KPERS' former investment adviser, and its former accounting firm. Pltf. App. 6, 17. Other respondents were sued later.

On March 17, 1992, some of the respondents moved in the Kansas state trial court to dismiss KPERS' claims on statute-of-limitations grounds, asserting that KPERS had made its Home Savings investment in a proprietary capacity, that the ordinary

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[1] KPERS is "a body corporate and an instrumentality of the State of Kansas." K.S.A. § 74-4903. It is part of a complex state statutory and administrative scheme created "for the purpose of effecting economy and efficiency in the administration of governmental affairs." K.S.A. § 74-4901.

[2] In filing this litigation, the Attorney General was acting at the direction of the Kansas Legislative Joint Committee on KPERS Investment Practices. Plaintiff's Appendix in the Eighth Circuit ("Pltf. App.") 1599. Shortly after the Attorney General filed the lawsuit, he withdrew as an attorney of record and was replaced by private lawyers who were retained by KPERS to actually carry out the litigation. *See* Pltf. App. 8.

statutes of limitation therefore applied to KPERS' claims,[3] and that all of KPERS' claims were barred by the two- and three-year statutes of limitation for tort and statutory actions, respectively (K.S.A. §§ 60-512, 60-513). *See* App. 2a. On August 21, 1992, the state trial court issued an exhaustive opinion rejecting respondents' motion on the ground that, under Kansas law, KPERS had made the Home Savings investment in a governmental capacity, and hence that no statute-of-limitations period applied to KPERS' claims against respondents, so that all of KPERS' claims were timely. *See* Pltf. App. 170; App. 2a.

After losing this statute-of-limitations motion in the Kansas trial court, respondents made no effort to seek reconsideration or to pursue an interlocutory appeal. Instead, on October 2, 1992, they filed a third-party petition against Home Savings' receiver, the Resolution Trust Corporation (RTC), alleging that the RTC had negligently mismanaged Home Savings and had lost money that could have been used to repay part of KPERS' losses. Respondents also sought indemnification under 12 C.F.R. § 545.121. *See* Pltf. App. 30; *see also* Pltf. App. 62, Doc. # 171.

Respondents' petition was ultimately dismissed as unmeritorious for failure to state a claim, *see* Pltf. App. at 565-68, 651-54, 772-74, but not before the RTC predictably invoked 12 U.S.C. § 1441a(*l*)(3)(A) (*see* App. 36a) to remove the entire case to the Western District of Missouri, where Home Savings had its principal place of business. *See* Pltf. App. 204-08.[4] Despite

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[3] Under Kansas common law, a governmental entity such as KPERS is not generally subject to any statute of limitations. *E.g.*, *State ex rel. Stephan v. GAF Corp.*, 747 P.2d 1326 (Kan. 1987). By statute, Kansas has limited this rule to circumstances in which the entity is engaged in a governmental, as opposed to a proprietary, function. K.S.A. § 60-521.

[4] Following the removal, KPERS promptly moved to remand the case on the grounds that the third-party claims asserted against the RTC had been properly severed from the lawsuit before the RTC removed the case and, in any event, that the third-party claims against the RTC were frivolous. The district court denied KPERS' motion; the Eighth Circuit affirmed. *Kansas Public Employees Retirement Sys. v. Reimer & Koger Assoc., Inc.*, 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994).

respondents' use of meritless and burdensome litigation against the RTC to obtain a federal forum for the case, the district court rewarded these tactics by declining to remand the case following the RTC's dismissal, *see* Pltf. App. 769-70 — even though the RTC had informed the district court that it had no interest in the case's remaining in federal court and that it assumed that the case would return to state court following the dismissal.[5]

Upon arriving in federal court, respondents moved for a second time, on November 25, 1992, to dismiss KPERS' claims against them as time-barred. The district court denied this motion. Disagreeing with the Kansas state trial court's ruling that KPERS had made its Home Savings investment in a governmental capacity, *see* Pltf. App. at 251-52, the district court nonetheless held that all of KPERS' claims were timely under the ten-year statute of limitations contained in a new statute specifically applicable to actions brought by KPERS (K.S.A. § 60-522, L. 1992, ch. 321, S. 21, enacted May 22, 1992). *See* App. 3a-4a; Pltf. App. at 535, 565-68.

An interlocutory appeal from that ruling was taken by respondents. Two and a half years after respondents filed their second statute-of-limitations motion, the Eighth Circuit ultimately ruled on the issue. On July 27, 1995, it issued a decision in which it disagreed with the construction of Kansas law reached by both the Kansas state trial court and the district court, holding that the standard two- and three-year statutes of limitation for tort and statutory actions, respectively, applied to KPERS' claims. *See* App. 4a.[6]

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[5] The RTC's counsel stated that the RTC had removed the case only "[f]or the purpose of pursuing our motion to dismiss. Once that's accomplished, the [RTC's] motion [to dismiss the third-party complaint] is ruled on, the RTC no longer has a reason or standing to be in the case. That's why we intervened for a limited purpose. The RTC's out of the case, there's no longer basis for federal court jurisdiction and it goes back to state court." Plaintiff's Supplemental Appendix at 2.

[6] Recently, on remand from the Eighth Circuit's decision with regard to the applicable statute of limitations, the district court held, completely contrary to the holding of the Kansas state trial court on respondents' first

3. The District Court's Ruling

At this point, frustrated by the nearly three years of wasteful federal litigation caused entirely by respondents' manipulative removal of the case and the district court's insistence on exercising supplemental jurisdiction even after the RTC's dismissal, and desiring to obtain an authoritative statute-of-limitations ruling from the Kansas appellate judiciary, KPERS filed two parallel lawsuits against respondents in a Kansas state trial court in August 1995. App. 4a, 21a; Pltf. App. 865-94, 895-941. A third parallel lawsuit had already been filed by KPERS in January. App. 21a; Pltf. App. 788-810. Remarkably, in two of the three parallel lawsuits, respondents quickly filed third-party claims against the RTC that were almost identical to those that had *already been dismissed as meritless* following the RTC's first removal. Pltf. App. 954, 1064. Within one day of these filings, the RTC predictably removed these two cases to the Western District of Missouri, just as it had done when it was impleaded in 1992. *See* App. 4a; Pltf. App. 1337, 1378.

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statute-of-limitation motion, that all of KPERS' claims against all of the respondents are barred under the Kansas statutes of limitation, terminating the case in its entirety. *See* Order Granting Motions for Summary Judgment dated June 3, 1996, in *Kansas Public Employees Retirement System v. Reimber & Koger Associates, Inc., et al.*, No. 92-0922-CV-W-9 (W.D. Mo., June 3, 1996).

Meanwhile, as the process of appellate review concerning the district court's application of the two- and three-year Kansas statutes of limitations is about to begin, the Kansas Supreme Court has accepted interlocutory review at the request of defendants in several separate cases brought by KPERS in Kansas trial court, in order to authoritatively resolve what Kansas statute of limitations applies to claims brought by KPERS: no limit (the view of the Kansas state trial court in this case); ten years (the view of the district court in this case); or two and three years (the view of the Eighth Circuit in this case). *See* Order in Kan. Sup. Ct. Case No. 96-76524-AS (May 3, 1996) (district court case Nos. 93CV389, 93CV588, 92CV433A, 92CV923, 92CV805). This procedure for authoritatively resolving the applicable statute of limitations would have begun four years ago had respondents in this case simply asked the Kansas Supreme Court for interlocutory review after they lost their initial motion, instead of filing meritless third-party claims against the RTC in order to hijack the case into federal court.

The respondent sued in the third new case, the KPMG Peat Marwick accounting firm, did not file any third-party claims against the RTC, and so that case was not removed. Instead, KPMG Peat Marwick filed a motion in the federal district court to enjoin KPERS from prosecuting this new Kansas state court action. App. 4a; Pltf. App. 1093. Further, the respondents in the newly removed cases filed motions to enjoin KPERS from filing future parallel actions against them. *See* App. 4a, 21a; Pltf. App. 942-46, 947, 1461.

The district court accepted removal of the newest cases impleading the RTC and, further, immediately issued a TRO to prevent "KPERS from filing any further actions in the future" as a means "to avoid further disruptions of this case," finding that "[i]t undermines my ability to effectively manage this case to have claims asserted elsewhere." App. 17a. Of KPERS' filing of the parallel Kansas cases, the district judge commented that "[I] now feel that I'm — I am in a boat with fewer and fewer rowers, at least fewer and fewer rowers that are pulling together," App. 18a, and as the basis for his decision explained: "I believe that I have reasonable power and authority to govern the conduct of the litigants in front of me so as not to interfere with the efficient administration of justice in this case." App. 19a.

KPERS opposed the preliminary injunction motions on a variety of jurisdictional grounds. The district court rejected all of KPERS' arguments. *See* App. 21a-35a. In the district court's view, the All Writs Act, 28 U.S.C. § 1651(a), authorized it "to enjoin duplicate cases from being pursued in other courts that would interfere with the processing of the pending case," because "the first court in which jurisdiction attaches has priority to consider the case" given the desirability of avoiding "multiplicity of litigation." App. 26a-27a.

4. The Eighth Circuit's Affirmance

On appeal, KPERS made three central arguments. First, KPERS argued that in reviewing the injunction, the Eighth Circuit was required to decide, as a subject-matter "jurisdictional" issue, whether or not the district court abused its discretion in refusing under 28 U.S.C. § 1367(c) to remand the case after the third-party

claims that had supported removal were dismissed as without merit; KPERS then argued in detail that the district court had abused its discretion under the four factors listed in Section 1367(c).[7] Second, KPERS argued that abstention principles must be consulted in applying Section 1367 and specifically that, as applied in this case, the district court's retention of the case, coupled with its injunction against litigation in any other court, violated the *Younger* doctrine.[8] Third, KPERS argued that the injunctions were invalid because a long line of precedent establishes that this Court has "never viewed parallel *in personam* actions as interfering with the jurisdiction of either court." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977); *see also Atlantic Coast Line R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 295-96 (1970); *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-35 (1922).[9]

The Eighth Circuit rejected each of these arguments. On the first issue, the Eighth Circuit flatly refused to review KPERS'

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[7] Brief of Plaintiff-Appellant at 16-22; Reply Brief of Plaintiff-Appellant at 6-7, 12-14, 21-22. Applying the four factors laid out in Section 1367(c), KPERS argued that the district court had abused its discretion in exercising supplemental jurisdiction because: (1) both KPERS' claims and respondents' defenses raised novel and complex issues of Kansas law, particularly in the area of the statute of limitations, where public policy concerns are important; (2) the state-law claims obviously "substantially predominated" over the third-party claims against the RTC that had provided the basis for removal, and which had been quickly dismissed as meritless; (3) all claims that had provided removal jurisdiction had been dismissed before trial, and it made no sense to reward respondents for filing such meritless claims by permitting them to remain in federal court; and (4) established principles of comity favored adjudication of state claims in state court, particularly where a State itself is the plaintiff, constituting "exceptional circumstances" pointing toward an immediate remand. Brief of Plaintiff-Appellant at 16-22.

[8] Brief of Plaintiff-Appellant at 9-13; Reply Brief of Plaintiff-Appellant at 14-16.

[9] Brief of Plaintiff-Appellant at 23-25; Reply Brief of Plaintiff-Appellant at 2-6.

argument that the district court had abused its discretion in applying the four-factor test of Section 1367(c), holding: "Even if the district court abused its discretion in retaining the case, the court would not be without jurisdiction." App. 7a. In so doing, the Eighth Circuit noted but rejected holdings by the D.C. Circuit and the Seventh Circuit "that the question of whether to retain a case after dismissing federal claims is jurisdictional." App. 7a n.3.

On the second issue, the Eighth Circuit treated the *Younger* doctrine as simply irrelevant under both Section 1367(c) and the special RTC removal statute relevant to the remand, holding that *Younger*'s comity concerns need not be considered at all in deciding whether to remand the case to state court following the dismissal of the meritless third-party claims that had been the basis of removal. *See* App. 6a, 14a.

On the third issue, the Eighth Circuit did not dispute the settled rule that, in general, a federal court lacks authority to enjoin parallel *in personam* actions on the theory that such duplicate litigation somehow "interferes" with the federal court's jurisdiction. App. 13a n.6. Thus, the Eighth Circuit declined to endorse the district court's main rationale for the sweeping injunction that it had entered to prevent the State of Kansas from prosecuting civil suits on its own behalf in its own courts. See p. 8, *supra*. Rather, the Eighth Circuit affirmed the injunctions on the theory that 28 U.S.C. § 1446(d), directing a state court to "proceed no further" once a given case is removed to federal court, authorizes federal courts to enjoin continued litigation not only of *the removed case*, but also of *separate cases* that are legally distinct from the removed case (despite their reliance on similar factual allegations). *See* App. 9a-13a.

REASONS FOR GRANTING THE WRIT

1. The first question presented concerns the Eighth Circuit's refusal even to address KPERS' powerful showing that the district court abused its discretion under 28 U.S.C. § 1367(c) in refusing to remand this case after the third-party claims against the RTC, which had provided the basis for removal, had been dismissed as meritless — even after the RTC made clear that it had no interest

in the case remaining in federal court. *See* pp. 6 & note 5, 9 & note 7, *supra*. Thus, the Eighth Circuit held, in admitted conflict with decisions in two other circuits, that "[e]ven if the district court abused its discretion in retaining the case, the court would not be without jurisdiction." App. 7a & n. 3.[10]

The Eighth Circuit's view derives from a highly contestable reading of the two-prong test for the exercise of supplemental jurisdiction that was laid out by this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988).[11] According to the Eighth Circuit, these cases draw a sharp demarcation between the "power to exercise jurisdiction" over supplemental claims, which is supposedly satisfied in every case by the mere existence of subject-matter jurisdiction at the start of the case, and "the advisability of exercising such jurisdiction." App. 6a-7a. Thus, the Eighth Circuit simply refused to "review the propriety of the district court's decision to retain supplemental jurisdiction," even though it affirmed in its entirety the injunctive relief issued by the district court. App. 7a.

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[10] The Eighth Circuit briefly suggested that this Section 1367(c) issue could be avoided by construing Section 1367 as simply inapplicable in a case like this. Under this theory, the district court would have no discretion at all to remand the case, despite the meritless nature of the underlying third-party claims against the RTC used to hijack the case to federal court, because the special removal statute relied on by the RTC supposedly "gave the court arising-under jurisdiction of the entire case," forever. App. 6a; *see also* App. 12a. This view adds merely a minor feature to the second question presented by this case. As explained below, see pp. 14-15, *infra*, elementary principles of statutory interpretation require that the framework established by Congress for discretionary remands under Section 1367(c) be interpreted in light of principles of comity long applied by this Court. Given these principles, the only significance of the special RTC removal statute is that federal jurisdiction existed in this case at the time of removal, satisfying Section 1367(a); discretion must remain to remand the case under Section 1367(c).

[11] 28 U.S.C. § 1367(a) & (c) essentially codified this two-prong *Gibbs* framework. *See, e.g., Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995); *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1266 (D.C. Cir. 1995); *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993).

The Eighth Circuit's attempt to pigeonhole all Section 1367(c) decisions as not subject-matter "jurisdictional," and as involving only "discretion" — so that they need never be reviewed on appeal from an injunction, or *sua sponte* on appeal — is highly dubious. Elements of discretion pervade many aspects of jurisdictional doctrine. *See generally* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985). There are certainly cases involving discretionary decisions in which it makes sense to view the issue as whether the particular jurisdictional statute involved can be construed to permit the result reached by the district court based on the exercise of discretion — thus posing a legal issue, involving the judicial "fine tuning" of the jurisdictional statute, which must be reviewed at the earliest opportunity on appeal. *See id.* at 561-62 & n.115, 574, 583.

The decisions of the Seventh and D.C. Circuits that the Eighth Circuit refused to follow have adopted this basic approach. Far from being in conflict with this Court's *Gibbs* and *Cohill* decisions, as the Eighth Circuit claims, *see* App. 7a n.3, the Seventh and D.C. Circuits are actually enforcing a key feature of those cases. In *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 & n.4 (7th Cir. 1987), the Seventh Circuit held, *sua sponte*, that the district court had erred in reaching the merits of pendent state-law claims following the dismissal of the federal claim before trial. It did so to enforce the "general rule" laid out in *Gibbs* that, absent "pressing reasons" to retain jurisdiction, where "the federal claim is dismissed before trial, the district court should relinquish jurisdiction of any pendent state law claim" if no continuing basis for federal jurisdiction exists. *Id.* at 1218 (citing *Gibbs*, 383 U.S. at 726).[12] The Seventh Circuit observed that "because the rule is jurisdictional, we are obligated to raise it ourselves," *id.* at 1218 n.4, and it held that because the record revealed no "pressing reasons for retaining jurisdiction . . . it was therefore an abuse of discretion for [the district court] to do so." *Id.* at 1218.

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[12] This general rule continues under Section 1367(c). *See, e.g.*, *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994).

The Seventh Circuit's reasoning in *Maguire* was endorsed recently by the D.C. Circuit sitting *en banc*. In *Lashawn A. v. Barry*, No. 94-7044, 1996 U.S. App. LEXIS 16256 (D.C. Cir. July 9, 1996) (en banc) (earlier panel decision cited by Eighth Circuit at App. 7a n.3), the court held that although *most* district court decisions regarding supplemental jurisdiction are not subject-matter "jurisdictional," *see id.* at *19-*22, "the *Gibbs* 'rule' that 'if the federal claims are dismissed before trial . . . the state claims should be dismissed as well" *is* "treated as 'jurisdictional.'" *Id.* at *22-*23 (quoting dissenting opinion and citing *Gibbs*, 383 U.S. at 726). In a dissenting opinion, two members of the court took an even broader view of why supplemental jurisdiction decisions generally should be treated as subject-matter "jurisdictional." *See id.* at *49-50 (Williams, J., joined by Henderson, J., dissenting) ("Here, the practical actions of courts . . . mark *Gibbs'* second step as jurisdictional") (citing Shapiro, *supra*, 60 N.Y.U. L. Rev. at 561-62); *see also id.* at *27, *42-*51.

Plainly, whether or not the second step of the *Gibbs* analysis qualifies as subject-matter "jurisdictional," at least where the federal basis for a lawsuit has disappeared before trial, is a fundamental issue of broad applicability. Indeed, this question persists under Section 1367(c). See notes 11 & 12, *supra.* Although only three circuits currently appear to be involved in a direct conflict over this issue, the lack of serious attention given by the other circuits to this important and recurring issue only serves to underscore the strong need for this Court to spell out, one way or the other, the duty of the courts of appeals with respect to discretionary jurisdictional determinations made by district courts under Section 1367(c). Certiorari should therefore be granted on this issue.

2. If this Court were to grant certiorari on the first question and if it agreed with KPERS, on the merits, that the Eighth Circuit erred in refusing to review the district court's exercise of discretion under Section 1367(c), then this Court would presumably remand the case and direct that the Eighth Circuit perform that function in the first instance, applying the four factors laid out in Section 1367(c). See p. 1, *supra*; see also p. 9, note 7, *supra* (summarizing KPERS'

arguments below under these four factors). Thus, we would not expect this Court itself to analyze these four factors, applied to the record of this case, without the benefit of the views of the court of appeals. However, we do urge this Court to accept certiorari on the second question so that, if it does agree with KPERS on the first question, this Court will be positioned to clarify for the Eighth Circuit on remand, and for the courts of appeal generally, the relevance under Section 1367(c) of abstention doctrines and other principles of comity.

On its face, this case presents enormous issues of comity. Private civil defendants accused of committing a massive fraud against on the State of Kansas have, through a series of brazen procedural manipulations, managed to get Kansas enjoined from litigating its solely state-law claims in its own courts, so that it is forced to litigate them in a federal court in Missouri. This substantial burden has been imposed on Kansas even though the case could never have been commenced in Missouri federal court, or in any federal court, by either side. Given the extraordinary posture of this case, the statutes governing whether the district court retained jurisdiction to hear the case cannot be considered in a vacuum.

In particular, as we urged the Eighth Circuit without effect, see p. 9 & note 8, *supra*, the district court's continued exercise of jurisdiction in the case, coupled with its injunction against litigation in any other court, violates the *Younger* doctrine (*see Younger v. Harris*, 401 U.S. 37 (1971)). Obviously, it is clear that under *Younger* itself, if respondents had been criminally prosecuted for their alleged fraud by the State of Kansas, in its own courts, respondents could not have enjoined those proceedings. Likewise, under *Trainor v. Hernandez*, 431 U.S. 434, 444-47 (1977), it is clear that the civil proceeding which the State of Kansas instead filed against respondents, in an effort to simply recover the proceeds from respondents' alleged fraud, could not have been enjoined by any federal court. It is only because of respondents' filing of meritless third-party claims against the RTC, the district court's refusal to remand this cases after those claims were dismissed, and the district court's issuance of injunctions to "protect" its removal jurisdiction that the district court has obtained

a jurisdictional monopoly over this case. Nonetheless, the Eighth Circuit ruled that *Younger* was simply irrelevant in deciding whether the relevant jurisdictional statutes permitted the district court to keep the case. *See* App. 14a.

KPERS urges this Court to address, prior to a remand, the relevance of abstention and other comity principles in this context, to prevent the circumvention of these principles and to ensure that respondents and other litigants are not rewarded for engaging in such burdensome jurisdictional machinations. Certainly, there is ample support for the view that abstention principles must be consulted in addressing whether or not it would be an abuse of discretion for a district court to continue hearing a case once the initial basis for federal jurisdiction disappears. *See, e.g.*, *Hagans v. Lavine*, 415 U.S. 528, 558-59 (1974) (Powell, J., joined by Burger, C.J. and Rehnquist, J. (now C.J.)) ("Of course, a decision to deny pendent jurisdiction on the ground that state courts should consider questions of state law naturally involves issues relevant to the question of abstention"); Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321, 374 (1990) ("The doctrines of supplemental jurisdiction and abstention present the federal courts with a host of interrelated concerns which deal primarily with judicial efficiency and the proper allocation of power between the state and federal judicial systems"); Shapiro, *supra*, 60 N.Y.U. L. Rev. at 580-81 ("federalism and comity concerns have been critical to the exercise of discretion in federal courts and should remain so").

3. Finally, regardless of whether this Court accepts review on the first two questions, and regardless of how it rules, certiorari is warranted on the third question in order to resolve a clear circuit conflict concerning the proper scope of injunctions that may issue under 28 U.S.C. § 1446(d).

The Eighth Circuit did not sustain the injunctions entered against the State of Kansas based on the district court's novel theory that it enjoyed broad power under the All Writs Act to enjoin parallel *in personam* litigation simply because it regarded such litigation as disruptive. See pp. 8-9, *supra*. Rather, the Eighth

Circuit held that Section 1446(d)'s directive that a state court must "proceed no further" once a case is removed to federal court authorized all the injunctions. *See* App. 9a-13a. Conceding that the plain language of Section 1446(d) "only commands the state court to stay the case that was actually removed," the Eighth Circuit cited authority from the Fifth and Ninth Circuits supposedly endorsing the idea that Section 1446(d) may be employed to enjoin any plaintiff in a removed case from filing a later state-court action that is crafted "for the purpose of subverting federal removal jurisdiction." App. 9a.

In fact, the cases cited by the Eighth Circuit reveal that both the Fifth and Ninth Circuits have *rejected* such a theory, with analysis that is directly contrary to the Eighth Circuit's construction of Section 1446(d). In *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 900-01 (5th Cir. 1975) (per curiam), the Fifth Circuit refused to permit an injunction against a parallel suit, filed after the first suit was removed on diversity-of-citizenship grounds, where the parallel suit named a non-diverse defendant with the obvious aim of preventing its removal. The Fifth Circuit indicated that because no *fraudulent joiner* existed (because the claims against the non-diverse defendant were valid), Section 1446(d) did not authorize an injunction. Agreeing with *Frith*, in *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988), the Ninth Circuit held that Section 1446(d) permits, at most, injunctions against the refiling of "essentially the same suit in state court" when it is obvious that the suit is removable. *Id.* at 740-41. Here, of course, neither the 1991 nor the 1995 suits filed by KPERS in Kansas state court were removable; only respondents' meritless third-party practice has led to removal. Under the construction of Section 1446(d) adopted by the Fifth and Ninth Circuits, the injunctions against KPERS are invalid; a square circuit conflict is therefore present, and this Court's review is warranted to address this recurring and important issue of judicial federalism.

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted.

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July 17, 1996

TABLE OF APPENDICES

APPENDIX A

Decision of the United States Court of Appeals for the Eighth Circuit, dated February 27, 1996 ..... 1a

APPENDIX B

Order of the United States Court of Appeals for the Eighth Circuit, denying petition for rehearing and rehearing *en banc*, dated April 18, 1996 ..... 15a

APPENDIX C

Excerpt of transcript of proceedings in the United States District Court for the Western District of Missouri, September 14, 1995 ..... 16a

APPENDIX D

Excerpt of transcript of proceedings in the United States District Court for the Western District of Missouri, September 28, 1995 ..... 20a

APPENDIX E

Order of the United States District Court for the Western District of Missouri, filed October 2, 1995 ..... 33a

APPENDIX F

12 U.S.C. § 1441a(*l*)(1) and 1441a(*l*)(3)(A) 36a

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 95-3499

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff—Appellant,

v.

REIMER & KOGER ASSOCIATES, INC., a Kansas Corporation; RONALD REIMER, an individual; KENNETH H. KOGER, an individual; CLIFFORD W. SHINSKI, an individual; BRENT MESSICK, an individual; ROBERT CREW, an individual; SHERMAN DREISESZUN, an individual; LELAND GERHART, an individual; I. I. OZAR, an individual; RAYMOND GIFFORD, an individual; HARRY S. JONAS, an individual; RANDALL M. NAY, an individual; FRANK SEBREE, an individual; TONY SALAZAR, an individual; PHILIP PISTILLI, an individual; MICHAEL K. RUSSELL, an individual; GAGE & TUCKER, a law partnership; PEAT, MARWICK, MITCHELL & CO., an accountancy firm; KPMG PEAT MARWICK, an accountancy firm; ROBERT SPENCE, an individual; THOMAS S. MORGAN, co-executor of the estate of FRANK S. MORGAN; MARILYN J, co-executor of the estate of FRANK S. MORGAN; ISABEL A. KIENE, executrix of the estate of RALPH E. KIENE,
Defendants—Appellees,

SHOOK, HARDY & BACON; C. PATRICK McLARNEY, Substituted for SHOOK HARDY law firm; BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C.,
Intervenor-Defendants—Appellees.

Submitted: December 13, 1995
Filed: February 27, 1996

Before McMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

[1065] JOHN R. GIBSON, Circuit Judge.

In this, the fourth interlocutory appeal in the Kansas Public Employees' Retirement System (KPERS) case, KPERS seeks review of the district court's[1] order enjoining KPERS from prosecuting lawsuits in Kansas based on the same claims being litigated in this case. Because we conclude that the effect of the Kansas lawsuits is to subvert the district court's removal jurisdiction, we affirm the district court's order.

KPERS invested $ 65 million in debentures of Home Savings Association, a Missouri-based savings and loan that failed. The RTC was appointed receiver for Home Savings. KPERS filed this case in Kansas state court on June 5, 1991 against Reimer & Koger Associates, KPERS's former investment advisers, seeking to recoup the $ 65 million. While the case was still pending in state court, KPERS also joined as defendants various officers and directors of Home Savings; Michael Russell, KPERS's own former chairman of the board; KPMG Peat Marwick, KPERS's accountants; and Gage & Tucker, KPERS's former lawyers. KPERS alleged only state-law claims.

The defendants promptly moved for summary judgment in the state court on the ground that KPERS's suit was barred by the Kansas two- and three-year statutes of limitations. The Kansas court ruled that KPERS was not subject to any statute of limitations and so denied the summary judgment motion. Then the Home Savings defendants impleaded the RTC, Home Savings's successor, which has a statutory right to remove any case to which it is a party to its choice of three federal district courts. When KPERS learned that the RTC had been impleaded, it had the third-party claims severed by ex parte proceedings in the Kansas court before the RTC could remove. Despite the severance, the

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[1] The Honorable Brook D. Bartlett, Chief Judge, United States District Court for the Western District of Missouri.

RTC removed the entire case to the federal district court for the Western District of Missouri; the district court held that the severance by the Kansas court was ineffective to prevent removal of the entire case, and we affirmed that holding. **[1066]** *KPERS v. Reimer & Koger Assocs.*, 4 F.3d 614 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 128 L. Ed. 2d 862, 114 S. Ct. 2132 (1994).

In the Western District of Missouri, the RTC moved to dismiss the third-party claims against it, and the district court granted its motion. The Home Savings defendants moved for reconsideration of the dismissal and the court granted the RTC the right to intervene for the limited purpose of defending the reconsideration motion and protecting its right to any derivative claims belonging to Home Savings that KPERS might assert; the court then reaffirmed its earlier dismissal of the claims against the RTC and held that KPERS was not asserting any derivative claims. In the wake of the RTC's dismissal, KPERS moved to remand the case to the Kansas state court, but the district court decided to retain jurisdiction of the case under 28 U.S.C. § 1367 (1994), the supplemental jurisdiction statute.

KPERS threatened to sue two additional law firms, Shook, Hardy, and Bacon and Blackwell, Sanders, in state court.[2] The law firms sought leave to intervene in the federal case. The district court allowed Shook, Hardy to intervene as a defendant and denied Blackwell, Sanders's motion to intervene. We reversed and allowed Blackwell, Sanders to intervene, although not as a defendant. *KPERS v. Reimer & Koger Assocs.*, 60 F.3d 1304 (8th Cir. 1995) (*KPERS II*). KPERS amended its complaint in federal court to add Shook, Hardy as a defendant.

Once in federal court, the defendants renewed their motion for summary judgment on the basis of the statute of limitations. The district court reconsidered the question decided by the state court

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[2] KPERS also threatened to sue Boatmen's First National Bank, the trustee on the indentures. Boatmen's sued in federal court for declaratory relief and obtained a preliminary injunction prohibiting KPERS from suing Boatmen's elsewhere. We reversed that injunction because it was not based on adequate findings of fact and conclusions of law. *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995).

and concluded that KPERS was subject to a statute of limitations, but that the applicable statute was ten years. The defendants took an interlocutory appeal from the holding that the ten-year statute was applicable. We reversed, holding that the ten-year statute was inapplicable and remanding for determination of which of the shorter statutes should be applied. *KPERS v. Reimer & Koger Assocs.*, 61 F.3d 608, 614-16 (8th Cir. 1995) (*KPERS III*), *cert. denied*, 133 L. Ed. 2d 845, 64 U.S.L.W. 3557, 1996 U.S. LEXIS 984, 116 S. Ct. 915 (Feb. 20, 1996).

On August 23, 1995, about a month after we announced our decisions in *KPERS II* and *KPERS III*, KPERS filed two new cases in the Kansas courts. In the first of these cases, KPERS sued Michael Russell; the Reimer & Koger defendants; and Shook, Hardy for damages arising out of the Home Savings investments. In the second, KPERS sued Peat, Marwick for negligence and breach of contract in auditing KPERS. Earlier, in January 1995 KPERS had also sued Blackwell, Sanders in state court for damages arising out of the Home Savings investments. One of the counsel for KPERS made a statement to the press, made part of the record below, that KPERS filed the cases in Kansas because of a "multitude of problems and issues that are causing delays in federal court, coupled with what we think is an erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations."

On September 11, 1995, Blackwell, Sanders and Shook, Hardy impleaded the RTC in their respective state court cases. The next day, the RTC removed both cases to the federal district court for the Western District of Missouri. Peat, Marwick did not implead the RTC and, therefore, its case is still pending in state court.

Blackwell, Sanders and Shook, Hardy moved in the original federal court action to enjoin KPERS from filing further state court actions against them, and Peat, Marwick moved to stay the pending state court action. In a brief filed with the district court in opposition to the motions for preliminary injunctions, KPERS stated, "Insofar as the Eighth Circuit was purporting to interpret Kansas law, KPERS has every right to seek reexamination of those questions in the **[1067]** courts of its own state, and the duty to do so when an erroneous federal court decision may effectively rob it of its day in court. State courts, of course, are not bound to follow

federal interpretations of state law."

The district court granted the injunctions. The court held that KPERS asserted claims in the new state lawsuits that were substantially identical to the claims KPERS asserted against the same parties (other than Blackwell, Sanders) in the original KPERS case pending before the district court. The court observed that "based on the information furnished by the parties . . . the reason the August 23, 1995, cases were filed by KPERS was to attempt to obtain Kansas courts' more favorable rulings on the statute of limitations issue decided by the 8th Circuit Court of Appeals and also to escape a multitude of problems and issues that are causing delays in federal court." The court held that the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), did not prohibit the grant of injunctive relief in this case. The court also held that the All Writs Act, 28 U.S.C. § 1651(a) (1994), authorized the relief, and that relief was appropriate under Northwest Airlines v. American Airlines, 989 F.2d 1002 (8th Cir. 1993). The court preliminarily enjoined KPERS from filing any further lawsuits arising out of the Home Savings investments against Shook, Hardy; Reimer & Koger; Blackwell, Sanders; Peat, Marwick; and defendants related to the firms named above. The court also enjoined KPERS from pursuing its existing Kansas case against Peat, Marwick.

KPERS appeals the injunctions, arguing that they were not authorized by the All Writs Act, 28 U.S.C. § 1651(a). It also argues that the district court should have denied the injunctions and remanded the original federal case to the state courts under federal abstention doctrines.

I.

KPERS devotes much of its brief to arguing that the district court erred in refusing to remand the first KPERS case to the state court after the RTC was dismissed. KPERS has not sought interlocutory review of that question directly. However, KPERS argues that if the district court erred in retaining jurisdiction, the court then lacks jurisdiction over the case and any injunction issued to protect the court's non-existent jurisdiction of this case is therefore erroneous.

We observe first, that the district court articulated two theories to justify its refusal to remand the case. First, the court concluded that it was an appropriate occasion for exercising supplemental jurisdiction under 28 U.S.C. § 1367, despite the dismissal of the RTC. Later, the court also stated that 12 U.S.C. § 1441a(*l*) gave the court arising-under jurisdiction of the entire case, so that exercise of supplemental jurisdiction was not even necessary. KPERS's argument goes only to the propriety of supplemental jurisdiction, not to the district court's alternative theory. However, under 12 U.S.C. § 1441a(*l*)(1) once the RTC becomes a party to the case, the entire action is "deemed to arise under the laws of the United States" and is within the original jurisdiction of the district court. Therefore, the federal court has arising-under, rather than supplemental, jurisdiction even over the claims that do not involve the RTC. *Spring Garden Assocs. v. RTC*, 26 F.3d 412, 417 (3d Cir. 1994).

At any rate, KPERS cannot prevail even if we limit our analysis to supplemental jurisdiction. In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988), the Supreme Court distinguished between the power to exercise jurisdiction over pendent (or supplemental) claims and the advisability of exercising such jurisdiction. Under the familiar test, "a federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.'" *Cohill*, 484 U.S. at 349 (quoting *Gibbs*, 383 U.S. at 725). The existence of this jurisdiction is determined at the time of removal, even though subsequent events may remove from the case the facts on which jurisdiction **[1068]** was predicated. *Bank One Texas Nat'l Ass'n v. Morrison*, 26 F.3d 544, 547 (5th Cir. 1994); *see KPERS I*, 4 F.3d at 622.

On the other hand, the decision of whether to exercise supplemental jurisdiction after dismissal of the federal claim is discretionary. *Cohill*, 484 U.S. at 349 ("*Gibbs* drew a distinction between the power of a federal court to hear state-law claims and

the discretionary exercise of that power.") It is the district court's decision to retain jurisdiction, not the existence of jurisdiction in the first place, which KPERS contends was improper. In fact, we decided the first question, the existence of jurisdiction, in *KPERS I*, 4 F.3d at 622. Even if the district court abused its discretion in retaining the case, the court would not be without jurisdiction. In *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990), we held that "it would have been more appropriate for the federal district court, once rejecting the federal claims, to have exercised its discretion and not passed on the pendent claim." *Id.* at 220. However, the district court had in fact retained and decided the pendent claim. Despite our conclusion that the district court should not have decided the pendent claim, on appeal we proceeded to review the state claim on the merits. *Id.* at 220-21. We could not have done so if the district court had lacked subject-matter jurisdiction.[3] Therefore, we need not review the propriety of the district court's decision to retain supplemental jurisdiction in order to decide this appeal.

II.

The most troublesome question in this appeal is whether the Anti-Injunction Act, 28 U.S.C. § 2283, forbids the district court's order. KPERS treats this issue only in a footnote on the last page of its brief. Though the Home Savings defendants urge us to consider this point waived, KPERS does cite cases interpreting the Anti-Injunction Act, and we cannot intelligibly discuss those cases without considering the Act itself.

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[3] We are aware of statements in *LaShawn A. v. Barry*, 69 F.3d 556, 562-63 (D.C. Cir. 1995), *vacated*, 1996 U.S. App. LEXIS 4404, 1996 WL 32955 (Jan. 30, 1996), and *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 n.4 (7th Cir. 1987), that the question of whether to retain a case after dismissing federal claims is jurisdictional. We consider these statements to conflict with the Supreme Court's language in *Cohill* and *Gibbs* and to be inconsistent with our action in *Condor Corp.*

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Anti-Injunction Act prohibits federal courts from enjoining proceedings in state courts unless the injunction falls within one of three exceptions. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970). Courts must construe the exceptions to the Anti-Injunction Act narrowly and resolve doubts in favor of letting the state action proceed. *Id.* at 297; *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (plurality).

The district court's orders in the Shook, Hardy and Blackwell, Sanders cases did not enjoin any case currently pending in the Kansas courts, since the cases filed in August 1995 were removed and no new case has been filed. The Anti-Injunction Act does not apply if there is no state litigation in progress when the federal court issues its injunction. *National City Lines v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982).

On the other hand, the Peat, Marwick case was not removed. It involves only state-law claims and Peat, Marwick did not implead the RTC. Thus, the Peat, Marwick injunction falls within the Anti-Injunction Act, unless one of the exceptions fits.

The district court held that all three exceptions to the Anti-Injunction Act applied to the Peat, Marwick case. However, Peat, Marwick limits its argument to the first exception--it contends that the injunction was authorized by an act of Congress.[4]

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[4] The other two exceptions are known as the "in rem" exception, *Lektro-Vend Corp.*, 433 U.S. at 641; *In re Federal Skywalk Cases*, 680 F.2d 1175, 1183 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982), and the "relitigation" exception, *NBA v. Minnesota Pro. Basketball, Ltd. Partnership*, 56 F.3d 866, 871 (8th Cir. 1995). The "relitigation" exception may be applicable, but would only support a narrowed injunction, not the blanket prohibition against further litigation that the district court entered in this case. *See id.* at 871-72.

[1069] The statute governing removal procedures, 28 U.S.C. § 1446 (1994), provides that after the defendant has given notice of removal and filed the notice with the state court, the state court "shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). This language has been considered express authorization to stay state court proceedings; therefore, injunctions to stay state proceedings in removed cases come within the first exception to the Anti-Injunction Act. *See Mitchum v. Foster*, 407 U.S. 225, 234 & n.12 (1972); *Lektro-Vend. Corp.*, 433 U.S. at 640.

Although the removal statute only commands the state court to stay the case that was actually removed, it has been interpreted to authorize courts to enjoin later filed state cases that were filed for the purpose of subverting federal removal jurisdiction. In *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899 (5th Cir. 1975) (per curiam), the Fifth Circuit stated that a district court could enjoin a state court case filed after removal if the second case was "an attempt to subvert the purposes of the removal statute." *Id.* at 901. *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988), recognizes the rule enunciated in *Frith*, stating, "It would be of little value to enjoin continuance of a state case after removal and then permit the refiling of essentially the same suit in state court." *Id.* at 741. *Lou* then somewhat clouds its statement by seemingly requiring a fraudulent filing in an attempt to subvert the removal but later states the rule in the disjunctive. *Id.* at 741.

In diversity cases, the federal court's jurisdiction can be subverted by fraudulent joinder of resident defendants to defeat diversity. *Frith* was a diversity case in which, after removal, the plaintiff filed a second suit in state court on the same claim, but joined a resident defendant, so that the defendants could not remove. The defendants removed anyway, relying on the doctrine of fraudulent joinder. The plaintiff moved to remand the second case, and the district court hearing that case granted the remand, specifically finding that the case did not fit within the doctrine of fraudulent joinder. 512 F.2d at 900. The defendants next obtained an injunction in the first, properly removed case prohibiting the plaintiff from proceeding in the state action. The Fifth Circuit reversed the injunction, saying that the second court's finding that

there was no fraudulent joinder was an implicit finding that "the second suit was not brought in an attempt to subvert the purposes of the removal statute and was not aimed at defeating federal jurisdiction." *Id.* at 901. *See also Myers v. Hertz Penske Truck Leasing*, 572 F. Supp. 500 (N.D. Ga. 1983).

The fraudulent joinder of non-diverse defendants is not relevant in cases based on federal question, rather than diversity, jurisdiction.[5] However, the same principle articulated in *Frith* applies in federal question cases: after removal the plaintiff cannot file essentially the same case in a second state action to subvert federal jurisdiction. In *Lou* the plaintiff first combined state and federal claims in a state court suit alleging derivative claims on behalf of a corporation and claims on behalf of a class consisting of the corporation's shareholders. After the defendants removed the first case, a second plaintiff, who was represented by the same attorneys and was also a shareholder, filed a second suit in state court in which she "asserted additional state law claims and **[1070]** omitted the federal claims." 834 F.2d at 733. The federal district court in the removed case enjoined the state court suit. The Ninth Circuit recognized that a federal court must have the ability to enjoin state proceedings that are filed to subvert the purposes of the relevant federal removal statute. *See* 834 F.2d at 741. However, on the facts before it, the Ninth Circuit reversed the injunction on the ground that it was barred by the Anti-Injunction Act. The district court had not found that the second suit was "fraudulent or an attempt to subvert the purposes of the removal statute." *Id.* at 741. The second suit involved "different plaintiffs, additional counsel, additional defendants, and only state claims." *Id.* at 741. Therefore, there was no basis for concluding that the new suit was merely a refiling of the old suit in "an attempt to subvert the purposes of the

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[5] KPERS contends that under *Frith* and *Lou* a federal court can only enjoin a second suit in cases of fraudulent joinder. This is an unduly narrow reading; we read those cases to mean that fraudulent joinder is one way in which a plaintiff can improperly attempt to subvert removal jurisdiction. That it is not the only way is demonstrated by the discussion of subversion of jurisdiction in *Lou v. Belzberg*, a federal question case.

removal statute," 834 F.2d at 741, and the district court erred in enjoining it. *Accord Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear and Allied Workers' Union*, 515 F. Supp. 456, 460 (S.D.N.Y. 1981) (denying injunction of second suit because "this is not a case where the plaintiff in the removed action has flouted the federal court's removal jurisdiction by filing substantially the same complaint in state court subsequent to the removal.")

In this case, the district court specifically found that KPERS's newly filed state suit against Peat, Marwick was an attempt to subvert the removal of the earlier case. The court further found that the new suit was substantially identical to the old and that KPERS had merely tried to "carve up what was one case into separate cases with separate claims, all leading to a subversion of the RTC's right to remove the entire case." The record fully supports these findings as KPERS made clear not only in a brief filed with the district court, but also in a statement to the press, that the purpose of filing the second action was to obtain a favorable decision in the Kansas courts on the statute of limitations issue decided by this court, which KPERS believed to be erroneous. The district court's findings are not clearly erroneous.

The wording and purpose of the RTC removal statute, 12 U.S.C. § 1441a(*l*), require that a federal forum be available for the entirety of any case to which the RTC is a party. Section 1441a(*l*)(1) bases federal jurisdiction on the existence of the RTC as a party: "Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding." We held in *KPERS I* that the purpose of section 1441a(*l*) included more than just providing a federal forum for claims asserted directly against the RTC. *KPERS I*, 4 F.3d at 620 & n.5. We held that the state court's attempt to sever the third-party claims against the RTC from the rest of the case could not insulate the principal claims from removal because the RTC continued to have an interest in the outcome of the principal claims. *Id.*

Further, in *Spring Garden Associates v. RTC*, 26 F.3d 412 (3d Cir. 1994), the Third Circuit held that the language of section 1441a(*l*)(1) granting jurisdiction over "any civil action, suit, or proceeding" to which the RTC is a party confers jurisdiction over "the entirety of any case to which the RTC is a party and not just those claims in such a case brought by or against the RTC." 26 F.3d at 415-16. The Third Circuit specifically held that claims against the RTC's co-defendants were not pendent claims. *Id.* at 417. *See generally In re Meyerland Co.*, 960 F.2d 512, 515 (5th Cir. 1992) ("The power conferred by FIRREA to invoke federal jurisdiction and to remove from state court is substantial. Access to federal courts in all actions to which it is a party allows the FDIC to develop and rely on a national and uniform body of law, consistent with eliminating the problems identified by Congress in having less rigorous state standards coexisting with federal ones." (citations omitted)), *cert. denied*, 506 U.S. 1049 (1993).

We conclude that the purpose of the RTC removal statute, 12 U.S.C. § 1441a(*l*), is to provide a federal forum for the entirety of any case to which the RTC is a party at the **[1071]** time of removal. To permit KPERS to circumvent this goal by prosecuting a competing suit in state court would therefore subvert the purpose of the RTC removal statute. Accordingly, we hold that the district court's injunction of KPERS's state suit against Peat, Marwick was "expressly authorized" by Congress and is permissible under the Anti-Injunction Act.[6]

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[6] KPERS argues that the All Writs Act, 28 U.S.C. § 1651(a), does not authorize the district court to enjoin KPERS from prosecuting its newly filed state court suit. Because we hold that 12 U.S.C. § 1441a(*l*) authorizes the district court's injunction, we do not address this argument.

III.

A.

KPERS argues that under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the district court should have remanded this case to Kansas state court because any action by the district court could disrupt Kansas's complex statutory scheme surrounding KPERS. While *Burford* is concerned with protecting complex state regulatory schemes from interference by federal courts, *Burford*, 319 U.S. at 334; *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 360-62 (1989), there is no such threat in this case. KPERS has sued several defendants to recover money it lost in a bad investment. This case only requires the conduct of the defendants be measured against the duties imposed by tort and securities law. Consequently, the district court will not intrude on any complex state regulatory scheme protected by *Burford*. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815-16 (1976) (holding *Burford* abstention inappropriate where state-law claims before the federal court will not affect state efforts to implement a uniform policy on a matter of substantial public concern). *Cf. Ankenbrandt v. Richards*, 504 U.S. 689, 705-06 (1992) (*Burford* abstention for domestic issues inappropriate where the domestic law question has no bearing on state-law tort claims before the federal court).

B.

KPERS also argues that the Supreme Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971), requires the district court to abstain and remand this case to Kansas state court, or failing that, to at least abstain from enjoining KPERS's newly filed state court suit. Abstention under *Younger*, however, is inappropriate where a federal court has exclusive jurisdiction over a claim. *See International Ass'n of Entrepreneurs of America v. Angoff*, 58 F.3d 1266, 1271 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 774 (1996); *Levy v. Lewis*, 635 F.2d 960, 967 (2d Cir. 1980). Under 12 U.S.C.

§ 1441a, the district court has exclusive jurisdiction over the entire case involving the RTC once the RTC has removed the case to the district court. Thus, *Younger* abstention is inappropriate in this case.

We affirm the order of the district court.

APPENDIX B

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 95-3499WMKC

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Appellant,

v.

REIMER & KOGER, etc., *et al.*,
Appellees.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Filed April 18, 1996

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff*,	)	
-vs-	)	
REIMER & KOGER ASSOCIATES, INC., A KANSAS CORPORATION, *et al.*, *Defendants*.	)	
	)	No. 92-0922-CV-W-9
MARK A. MORGAN, THOMAS S. MORGAN, and MARILYN J. FEINGOLD, Co-executors of the Estate of FRANK MORGAN, *et al.*, *Third Party Plaintiffs*,	)	Kansas City, Missouri Civil
-vs-	)	SEPT. 14, 1995
RESOLUTION TRUST CORPORATION, *Third Party Defendants*.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE D. BROOK BARTLETT,
UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

DONNA M. TURNER, RPR, CM
United States court reporter
811 Grand Avenue, Room 443
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[excerpt]

[67]

THE COURT: Anybody else have anything to say? All right. I'm going to issue a temporary restraining order against KPERS from filing any further actions in the future against Shook Hardy & Bacon for any claim that is asserted in this case by KPERS against Shook Hardy & Bacon or related to or arising out of any claim asserted in this action.

I'm doing this primarily to maintain the status quo, to avoid further disruptions of this case by the actions of KPERS by filing identical claims in state court or anywhere else against Shook Hardy & Bacon. It disrupts this case. It makes it increasingly difficult and expensive to process the claims being asserted in this case. It undermines my ability to effectively manage this case to have claims asserted elsewhere, motions filed here, time taken up arguing about it when we have important issues to resolve in this case.

Furthermore, my concern is that the extension of the argument made by KPERS gives KPERS essentially a free ride in this case, immune from any kind of control by me **[68]** whatsoever. This is not an 11th Amendment issue in my view. The 11th Amendment is not implicated by this. No lawsuit is being filed against KPERS, no claim for relief is being asserted against KPERS in this case.

What is happening is a request is being made only to control the behavior of KPERS that is detrimental to the processing of this case, and to prohibit it from filing repetitive, identical, or similar claims in other courts when those claims are either pending here or easily could be pending here if they sought leave to amend were granted leave to amend.

I do not believe that under the clear and under the wording of the 11th Amendment, that the 11th Amendment was intended to affect the ability of a United States court to manage efficiently and fairly litigation pending in front of it.

No request has been made by any party in this case to grant relief against KPERS. No request and no claim is being prosecuted against a state of the United States by the citizens of another state. It is not an 11th Amendment issue, in my view.

I think the 11th Amendment, if interpreted to that extent, would give KPERS some kind of authority to resist the appropriate rules of procedure governing parties appearing in front of this or any other federal court. **[69]**

The terms of the temporary restraining order, as I stated, and the nature of the temporary restraining order is intended primarily to keep this situation as it presently exists until such time as the matter can be taken up with everybody having more of an opportunity to study the law applicable to this situation. And I'm fearful that ultimately this is just going to lead to another delay in the processing of this case, which it seems to me it's high time that people quit complaining about delay in this case and start dedicating themselves to getting it processed.

I've attempted to dedicate myself to that and now feel that I'm -- I am in a boat with fewer and fewer rowers, at least fewer and fewer rowers that are pulling together. I believe that this is a good example of the kind of thing that is causing great difficulty. I think, based on what's been presented here so far, it is not an unreasonable conclusion that what KPERS is doing is trying to avoid and evade the order of the 8th Circuit as to the proper law to be applied in this case by attempting to get into state court and have established some different law so that they can come running back over here and tell the 8th Circuit, no, you misread the law of the state of Kansas.

Obviously, the 8th Circuit Court of Appeals read the law of the state of Kansas differently than I did and I'm obligated to enforce that law in the way it was **[70]** announced by the 8th Circuit of Appeals.

Furthermore, this case arrives in this court, regardless of its present status, it arrived in this court as the result of an authority specifically granted by Congress to the RTC to bring this case here. The authority that Congress granted the RTC to bring this case to the United States District Court for the Western District of Missouri it seems to me does not allow, for it to be effective, KPERS to repeatedly run back to Kansas, file further suits, which again involve the RTC, which again involve the RTC removing.

The purposes of that whole statutory scheme, it seems to me, are undercut by the efforts of a party to repeatedly assert claims that

it knows will ultimately end up right back in this court as a result of removal by the RTC. In all, it seems to me that what is really going on here is a rather direct challenge to the supremacy clause of the United States Constitution and that the supremacy clause operates -- is operating and must be protected in its proper operation so that this court is afforded the ability which Congress intended for it to have to process this case.

And whether it's presently being processed under that removal right or under some other derivative right resulting from the original removal right seems to me to be [71] irrelevant. It is being processed under authority granted the United States District Court for the Western District of Missouri, and I believe that I have reasonable power and authority to govern the conduct of the litigants in front of me so as not to interfere with the efficient administration of justice in this case.

Now, we need to talk about when we're going to take this motion up on the request for preliminary injunctive relief. I guess there is the matter of the bond. I'll be more than happy to hear what any party wishes to say about the amount of the bond.

You know, I should say in addition, it also seems to me that there may well be a legitimate question of whether KPERS is protected by the 11th Amendment at all in its proprietary capacity. That is the law of this case at this point, and when states create agencies to operate in the manner in which I have determined that KPERS operates, I have some question about whether the 11th Amendment protects states who choose to operate in a proprietary capacity. But that's another matter that will be resolved at a future time, either in this court of some other court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	
-vs-	)	
REIMER & KOGER ASSOCIATES, INC., A KANSAS CORPORATION, *et al.*, *Defendants.*	)	
_____	)	No. 92-0922-CV-W-9
MARK A. MORGAN, THOMAS S. MORGAN, and MARILYN J. FEINGOLD, Co-executors of the Estate of FRANK MORGAN, *et al.*, *Third Party Plaintiffs,*	)	Kansas City, Missouri Civil
-vs-	)	SEPT. 28, 1995
RESOLUTION TRUST CORPORATION, *Third Party Defendants.*)	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE D. BROOK BARTLETT,
UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

DONNA M. TURNER, RPR, CM
United States court reporter
811 Grand Avenue, Room 443
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[excerpt]

[102]

THE COURT: On September 13, 1995, Shook Hardy & Bacon filed a renewed application for temporary restraining order and preliminary injunction. On September 11, two days before, the Reimer & Koger defendants filed a motion for preliminary and permanent injunction and for attorney's fees. One day later, September 12, KPMG Peat Marwick and Robert Spence filed a motion to enjoin state court proceedings, and on September 13, Blackwell Sanders filed a renewed and amended motion for preliminary injunction.

September 21, KPERS filed its response to these motions, and on September 25, various defendants filed replies to KPERS' suggestions in opposition.

On September 19th, 1995, I entered a temporary restraining order enjoining KPERS from filing in any court claims against Shook Hardy & Bacon arising out of KPERS' investment in Home Savings Association.

On August 23, 1995, KPERS filed in the District Court of Shawnee County, Kansas, Case No. 95-CV-936 against Michael Russell and a relatively large number of other **[103]** defendants, among which were Reimer & Koger Associates, Inc., and then the individuals Reimer, Koger, Crew, Shinski, and Messick. Also defendants in that case were Shook Hardy & Bacon, Shook Hardy & Bacon, P.C., and various partners of Shook Hardy & Bacon.

Also on August 23, 1995, KPERS filed in the District Court of Shawnee County, Kansas, case No. 95-CV-937 against Peat Marwick, and based on this record, I'm not sure who else was a defendant in that case, what individuals, if any, but at least Peat Marwick was named.

On January 6th, 1995, KPERS filed a case against Blackwell Sanders in the District Court of Shawnee County, Kansas, case No. 95-CV-20, which case, after pending in Shawnee County, Kansas, from January to I assume sometime this month, although I'm not exactly sure of the date, was removed to the United States District Court for the Western District of Missouri by the RTC. The case

presently pends in this court.

With the exception of the Blackwell Sanders case, which this next comment is not intended to apply to, the claims asserted by KPERS in the other two cases filed recently in Kansas are substantially identical to and assert claims that are substantially identical to the claims asserted by KPERS against the named defendants in the Kansas case in this court. **[104]**

That's pretty fouled up. I'll take another shot at it here.

In the two August 23, 1995, cases filed in the District Court of Shawnee County, Kansas, the claims asserted by KPERS against the defendants in those cases are substantially the same, if not identical to, the claims asserted in this case by KPERS against the same defendants.

Based on the information furnished by the parties and at least insofar as it goes not disputed, the reason the August 23, 1995, cases were filed by KPERS was to attempt to obtain Kansas courts' more favorable rulings on the statue of limitations issue decided by the 8th Circuit Court of Appeals and also to escape a multitude of problems and issues that are causing delays in federal court. In other words, referring to, apparently, a multitude of problems and issues that are causing delays in this case.

The 11th Amendment issue.

KPERS asserts that it is immune from, protected by the 11th Amendment so far as these defendants' request for injunctive relief.

Defendants argue that KPERS has waived the 11th Amendment. Even assuming, which they do not concede, but even assuming that KPERS is the state of Kansas, a state can waive, by inference and by its actions, the protection **[105]** of the 11th Amendment. See for instance Hankins vs. Finney, F-I-n-n-e-l, 964 F.2d, 853 at 856. Certainly a state can, by its actions, waive the protection of the 11th Amendment. For instance, the general appearance by a state in federal court and proceeding to defend a case on the merits has been found to waive the protection of the 11th Amendment.

In this case, we have not appearance by KPERS as a defendant but we have KPERS as a plaintiff seeking relief. Now, had KPERS filed this case in this court, the issue of waiver would be so clear

that probably — the waiver would be so clearly established that it would not be worth talking about.

The complexity of the waiver analysis in this case arises from the fact that this case arrived here by operation of the removal statute. So I am left with the question of whether waiver by a state of 11th Amendment protection can occur when it's a plaintiff when it ends up in federal court as a result of the operation of the removal statute; in other words, is there that aspect of behavior, of voluntary behavior, that characterizes a waiver analysis and which justifies implying or concluding that by the voluntary behavior, a state has relinquished its claim to 11th Amendment immunity.

Two factors suggest to me that it has. First of **[106]** all, as a general matter when a plaintiff files a lawsuit, they are by implication, it seems to me, saying that they agree to be bound by the lawful application of the rules of procedure governing the pursuit of that case. They don't go in with one hand behind their back saying we'll abide by the rules and we agree to be bound by the rules so long as they work in our favor. If they don't work in our favor, then we disavow any responsibility for complying with those rules because we disagree with them.

So when KPERS initiated this lawsuit, although they may not have expected and might not have expressly known what would happen to their lawsuit and that it would ultimately end up in the United States District Court for the Western District of Missouri, it agreed, by being a plaintiff, to be bound by those rules and, therefore, it seems to me, its behavior is the equivalent of voluntary acceptance of the rules, and, therefore, can be used as an indication of waiving 11th Amendment protection.

For instance, had the case been removed to the United States District Court for the District of Kansas rather than the United States District Court for the District of Missouri, couldn't KPERS then assert some kind of 11th Amendment immunity? I think that stretches imagination a little. For instance, could KPERS have said, no, you can't file a counterclaim against us because, you **[107]** see, we're protected by the 11th amendment. We can sue you but you can't sue us.

Now, the second thing that causes me to believe that there was a waiver, in addition to KPERS being a plaintiff and asserting a claim, is that once in this court they continued to assert their claim; they continued to take advantage of the procedures of this court, discovery procedures; they continued to seek relief from and obtain rulings, some in their favor, some against them, but to obtain the benefits of being a litigant in this court, which equates to the kind of voluntary behavior that legitimately and properly can infer waiver of the 11th Amendment. Voluntarily participated pursuing claims in this court for their benefit, and by that, waive the protection of the 11th Amendment.

But there's another reason why the 11th Amendment doesn't protect them in the context of this case, even if the waiver argument is not resolved against KPERS. And that is that no suit or claim for affirmative relief is being brought against KPERS or being sought against KPERS. None of the defendants seeking injunctive relief are asserting a claim in law or equity against KPERS of the type that is covered by the 11th Amendment.

In this situation, we have KPERS, the litigant, KPERS, the plaintiff, who is asserting the claims. The **[108]** defendants, by their request for injunctive relief, are only requesting that KPERS, the litigant, abide by certain rules that apply to litigants in federal court, just the same as other litigants; that KPERS, the plaintiff, be subject to the same rules and principles of judicial administration that govern other litigants.

That is not the situation of Oregon vs. City, which KPERS relies upon.

The 11th Amendment does not prevent a United States District Court from controlling the litigants in a pending case. For instance, a penalty could be asserted against KPERS for contempt of court. A financial penalty could be asserted against KPERS for failing to comply with an order of the court; failing to carry out its discovery responsibilities.

Similarly, KPERS can be enjoined, restrained, prevented, if appropriate, from pursuing in other courts the same claims that are being asserted in this case.

Now, everything I have said up to now has assumed that KPERS is the state of Kansas barring agency of the state of Kansas qualifying for the protection of the 11th Amendment.

Because I believe on the record presented in this case, there is a reasonable argument that KPERS is the state of Kansas, under Hess vs. Port Authority, I have **[109]** assumed that — assumed without deciding, that KPERS is the state of Kansas. I am reluctant to decide it for a number of reasons, not the least of which is that apparently there is another judge of this court that has been taking evidence on this issue and apparently has it under advisement, and I'm not inclined to complicate that judge's life with a ruling at this point that might conflict with that judge's conclusion after a good deal more attention apparently to this issue than I have been afforded the opportunity to give to it.

One more 11th Amendment issue. The Reimer & Koger defendants are not collaterally estopped from disputing that KPERS is protected by the 11th Amendment. The argument that they are is based on the case of American International Specialty Lines Insurance Co. vs. Reimer & Koger, 874 F. Supp. 324, a decision of the District of Kansas in 1995.

In that case, the District Court for the District of Kansas concluded KPERS was an arm of the state for 11th Amendment purposes.

For the reasons stated by Reimer & Koger, and I'm not going to belabor it, the collateral estoppel is not applicable, the issues are not the same and the issue was not actually raised and litigated in that case in a manner sufficient to implicate and to raise collateral estoppel. **[110]**

Therefore, for all of those reasons, KPERS has not satisfied its burden of demonstrating that it is protected by the 11th Amendment in the circumstances of the issues raised in this case, and more specifically by the issues raised by the motions for injunctive relief.

I go no further, and nothing I have said should be interpreted as going any further than that.

Now, let me turn now to the — take up some issues having to do with the request for preliminary injunctive relief against KPERS

filing any further cases against certain defendants in Kansas on claims related to KPERS' investments in Home Savings Association.

KPERS opposes these requests on a number of grounds, one of which is the exercise of supplemental jurisdiction in the case was improper. The issue KPERS raises along this line — the arguments they make along this line with regard to the motions for injunctive relief are advanced by KPERS in support of their third motion, second or third motion, to remand which is pending to be taken up on October 18th, 1995.

For the purpose of ruling on these motions for injunctive relief at this time, I am going to follow the previous decisions that I have made, decisions of the 8th Circuit Court of Appeals, and will continue to follow those decisions and conclude that I do have jurisdiction, **[111]** supplemental jurisdiction, for the reasons I've stated, until we take up the motions on October 18th.

Naturally, obviously, if at that point I'm persuaded I have no jurisdiction, then anything I might do here today in the way of granting injunctive relief would be immediately rescinded. But I am not so overwhelmed by or so immediately persuaded by KPERS' arguments that I have no jurisdiction that I believe this approach runs any substantial risk of being improper.

However, by saying that, I'm not saying that I won't give full consideration to the motions, and may well be convinced by KPERS' eloquent counsel at the time that that motion to remand is taken up.

KPERS argues that the All Writs Act does not authorize the injunctive relief requested by those defendants who are seeking to restrain filing further cases against them. I do not agree with the position for the reasons that the defendants state. The All Writs Act does not restrict or place a limitation on the power of the court in an appropriate situation to enjoin duplicate cases from being pursued in other courts that would interfere with the processing of the pending case.

The All Writs Act grants broad injunctive powers to the United States courts, and among those powers is the power to control parties before this court in the filing of **[112]** duplicate and disruptive litigation.

The Anti-injunction Act speaks more directly and is a more likely source of restraint because it does speak directly to limitations on enjoining state court proceedings. However, the Anti-injunction Act does not apply to restraining future filings of state court cases. See Dombrowski vs. Pfister, 85 S. Ct. 1116.

Because I do not agree with KPERS that at this time on this record I lack jurisdiction to control the behavior of KPERS in filing other lawsuits against the parties who are defendants in this case , the question then becomes what is the proper standard to determine whether injunctive relief should be afforded. Northwest Airlines vs. American Airlines, 989 F.2d 1002, the 8th Circuit Court of Appeals, in an opinion written by Judge Bowman, states that injunctions of the type that are sought here are not subject to the Dataphase standards for injunctive relief, but instead are subject to standards set forth in United States Fire Insurance Co. vs. Goodyear Tire and Rubber Company, 920 F. 2d, 487 at 488, 489, a 1990 decision of the 8th Circuit Court of Appeals.

In Goodyear, the court calls attention to the well-established rule that in cases of concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case, and that in the **[113]** absence of compelling circumstances, the first-filed rule should apply.

Insofar as the future assertion of claims against these defendants are concerned, in cases filed in Kansas in the future, there has been no compelling circumstance presented which would prevent the application of the first-filed rule. The claims asserted in the case against these defendants in this case, the case that is presently pending in this court, are first-filed in comparison to cases that might be filed after this date asserting the same claims.

Therefore, under the Northwest Airlines standard, the defendants are entitled to injunctive relief against the filing of future cases asserting the same claims or related claims to those asserted in this case related to KPERS' investments in Home Savings Association.

Granting injunctive relief furthers the general federal policy against multiplicity of litigation and furthers the policies of most states against multiplicity of litigation; comports with common

sense; protects and furthers the ability of this court to as efficiently and as economically as possible resolve the issues raised in this case against these defendants free of the distractions, which the track record of this case demonstrate fully occur when efforts are made to assert the same claims in other **[113]** courts.

Even if one were to proceed with the analysis to consider the Dataphase requirements as sort of an advisory way to determine if the result of the first-filed rule is the appropriate result, one finds that to the extent Dataphase and its factors could be applied to this case, that the balance, after weighing the equities, favors granting injunctive relief, maintaining the status quo, the status quo being the pendency of and processing of these claims in this court, free of the distractions, expense, and effort caused by having to deal with other litigation raising the same issues.

The public interest cries out for the expeditious final resolution of the claims asserted by KPERS against these defendants. In light of the length of time the case has been pending in this court, the effort and expense which has been invested by all concerned in it, the public interest in the fair, efficient, and expeditious resolution of the dispute demands doing everything reasonable that can be done to assure that that public interest is achieved.

KPERS asserted public interest, or interest in obtaining a favorable resolution of issues that are ruled against it in this case by going to what is perceived to be a more friendly forum. It does not come close to balancing **[115]** out the public's real interest in the expeditious and final resolution of this litigation. It is much too simplistic and almost irrational to suggest the public has an interest in resolving this dispute one way or the other. To have this dispute resolve in a fair, unbiased forum is of far more concern to the public than who prevails.

So even if one were to engage in a Dataphase analysis, I believe that one would find that one would be led to the same conclusion that one reaches under the Northwest Airlines first-filed approach.

And, therefore, KPERS will be preliminarily enjoined. Therefore — I'll start that over again. Therefore, KPERS, its officers, trustees, and attorneys representing KPERS are enjoined,

upon the posting of an appropriate security or bond, from filing in any court, including the courts of the state of Kansas, any claims arising out of or related to KPERS' investments in Home Savings Association against Shook Hardy & Bacon, Shook Hardy & Bacon, P.C., and/or any partner of Shook Hardy & Bacon; against the Reimer & Koger defendants, that's Reimer & Koger Associates, Inc., and the individuals Reimer, Koger, Crew, Shinski, and Messick; against Blackwell Sanders Matheny Weary & Lombardi; and against Peat Marwick Mitchell and whoever the individual defendant —

MR. TONE: Robert Spence, your Honor. **[116]**

THE COURT: — Robert Spence, or against KMPG, Peat Marwick & Mitchell.

MR. JONES: Your Honor —

THE COURT: Yes.

MR. JONES: — with respect to Blackwell Sanders would your injunction go to protecting them from any suits against individual members of that firm?

THE COURT: Yes.

MR. JONES: Thank you.

THE COURT: So long as — I mean, so long as the claims or the actions claimed attempt to raise the same claims asserted in the case that's been removed here, that's presently pending in this court, yes. It certainly doesn't have anything to do with claims unrelated to Home Savings or anything else, but with that understanding, yes.

Insofar as the request by Peat Marwick & Mitchell for injunctive relief against KPERS from proceeding with KPERS vs. Peat Marwick Mitchell & Co., No. 95-CV-937 in the District Court of Shawnee County, Kansas, KPERS argues that such injunctive relief of the type requested is inappropriate and not permitted under the Anti-injunction Act, 28 U.S.C. Section 2283.

There are exceptions to the prohibitions of the Anti-injunction Act. Peat Marwick asserts that one of **[117]** those exceptions — or that a number of those exceptions apply.

One exception is if injunctive relief is expressly authorized by an act of Congress. The test for this exception, as to whether an act

of Congress qualifies as an expressly authorized exception to the Anti-injunction Act, is whether the act of Congress clearly creating a right readily enforceable in a federal court of equity could be given its intended scope only by the stay of a state court proceeding.

Injunction enjoining a second suit filed in state court is authorized if filing the second lawsuit would subvert the purposes of the removal statute.

Here, the purposes of allowing the RTC to remove not only a claim asserted against it but to remove the entire case in which a claim against the RTC is asserted would be subverted by allowing the plaintiff to continuously refile claims in state court against the defendants who were parties to the removed action. It puts a continuous burden on the RTC to make certain that its interests are not involved in or threatened by repetitive filings in the state court.

Based on the record in this case, the similarity of the relief sought in the later-filed state cases to the relief sought in this case against Peat Marwick, and based **[118]** on the other factual conclusions reached as to the motivation for filing the recent cases in state court, the recent case against Peat Marwick filed in state court was intended to defeat removal jurisdiction, was intended to carve up what was one case into separate cases with separate claims, all leading to a subversion of the RTC's right to remove the entire case, with all of the claims, to federal court.

Another exception to the Anti-injunction Act is the so-called relitigation exception. The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel. See Chick Kam Choo vs. Exxon, 108 S.CT. 1684. The relitigation exception prevents the costly and judicially wasteful redetermination of issues already decided by a federal court. The exceptions were placed in the Anti-injunction Act by Congress to ensure the effectiveness and supremacy of federal law.

However, an essential prerequisite of the application of the relitigation exception is that the claims the federal injunction insulates from litigation in state proceedings have actually been

decided by the federal court. See Daewoo Electronics vs. Western Auto Supply, 975 **[119]** F. 2d 474 at Page 477.

In this case, the claims on the merits against Peat Marwick have not been decided. However, the exception bars KPERS from alleging claims that fall outside the statute of limitations as determined by the 8th Circuit Court of Appeals.

Because I have concluded that that is part of the motivation for pursuing Peat Marwick and the other defendants, but Peat Marwick in Kansas in the August-filed cases, the relitigation exception is another ground for voiding the prohibition of the Anti-injunction Act.

Another exception is the in-aid-of-jurisdiction exception. Federal courts can enjoin where necessary to protect the federal court's ability to properly administer a case. See Atlantic Coastline Railroad vs. Brotherhood, 90 S. Ct. 1739, 1747.

Here, KPERS is, in part, attempting to relitigate and avoid a decision of the 8th Circuit Court of Appeals on the statute of limitations. By doing so, KPERS delays the resolution in this court of the issues presented, distracts the litigants from devoting their resources to the fair, efficient, and expeditious resolution of the issues in this case, increases the expense for all concerned, and therefore, the in-aid-of-jurisdiction exception is also satisfied. **[120]**

Applying the same analysis that I applied previously to the request to enjoin other lawsuits against the defendants in this case, Peat Marwick has satisfied the prerequisites of granting injunctive relief against KPERS, its officers, trustees, attorneys, from pursuing further the pending case in Shawnee County, Kansas.

The claims asserted in the case against Peat Marwick were first filed in the case that is presently pending here. There is no compelling circumstance that has been developed or shown that would justify allowing KPERS to pursue in two forums the same claim at the same time when the impetus, in part, was to avoid a decision on an issue entered in this case after a full and fair opportunity for all parties to express themselves on the issue. Forum-shopping to avoid adverse decisions result in a serious waste of limited judicial resources, endless relitigating of issues resolved between parties in the case, is inconsistent with principles

of federal judicial administration in most states.

So for all of those reasons, KPERS will be enjoined from pursuing that case in the state of Kansas against Peat Marwick & Mitchell, subject to the posting of adequate security or a bond.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	
v.	)	
REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants.*	)	No. 92-0922-CV-W-9
FRANK MORGAN, et al., *Defendants and Third-Party Plaintiffs,*	)	Filed Oct. 2, 1995
v.	)	
RESOLUTION TRUST CORPORATION, *Third-Party Defendant.*	)	

ORDER GRANTING MOTIONS FOR PRELIMINARY INJUNCTION

On September 11, 1995, the Reimer & Koger defendants filed a Motion for Preliminary and Permanent Injunction.

On September 12, 1995, KPMG Peat Marwick LLP and Robert W.L. Spence filed a Motion to Enjoin State Court Proceedings.

On September 12, 1995, Blackwell Sanders Matheny Weary & Lombardi (Blackwell Sanders) filed a Renewed and Amended Motion for Preliminary Injunction.

On September 13, 1995, Shook, Hardy & Bacon filed a Renewed Application for a Preliminary Injunction.

In their motions for preliminary injunction, defendants and intervenor Blackwell Sanders seek to enjoin and restrain KPERS from filing future suits against them in any court, other than this one, for claims arising out of KPERS' investments in Home Savings Association.

In addition, KPMG Peat Marwick LLP and Robert W.L. Spence seek to enjoin KPERS from prosecuting further *KPERS V. Peat, Marwick, Mitchell & Co.*, No. 95-0937-CV, which is pending in the District of Shawnee County, Kansas.

A hearing was held on September 28, 1995, in which the parties presented oral arguments on the motions for preliminary injunctive relief.

Based on the findings of facts and conclusions of law stated on the record at the September 28, 1995, hearing, it is ORDERED that:

1) Shook, Hardy & Bacon's Renewed Application for a Preliminary Injunction is granted;

2) KPMG Peat Marwick LLP and Robert W.L. Spence's Motion to Enjoin State Court Proceedings is granted;

3) Reimer & Koger defendants' Motion for Preliminary and Permanent Injunction is granted;

4) Blackwell Sanders' Renewed and Amended Motion for Preliminary Injunction is granted;

5) pursuant to Rule 65 (c), Federal Rules of Civil Procedure, defendants' and intervenor Blackwell Sanders' preliminary injunctions are granted subject to each group of defendants and intervenor Blackwell Sanders Matheny Weary & Lombardi depositing with the Clerk of the Court $500 in security;

6) KPERS is enjoined from filing in any court, other than this one, claims against the following defendants that arise out of KPERS' investments in Home Savings Association: Shook, Hardy & Bacon; KPMG Peat Marwick LLP; Robert W.L. Spence; Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth Koger, Robert Crew, Clifford Shinski, and Brent Messick;

7) KPERS is enjoined from filing in any court, other than this one, claims against intervenor Blackwell Sanders Matheny Weary & Lombardi, L.C. arising out of KPERS' investments in Home Savings Association; and

8) KPERS is enjoined from prosecuting further *KPERS v. Peat, Marwick, Mitchell & Co.*, No. 95-0937-CV, pending in the District Court of Shawnee County, Kansas.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

October 2, 1995

APPENDIX F

12 U.S.C. § 1441a(*l*)(1) and 1441a(*l*)(3)(A) govern the removal of state-court actions involving the Resolution Trust Corporation ("RTC") and provide in relevant part:

> **(*l*) Power to remove; jurisdiction**
>
> **(1) In general**
>
> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.
>
> * * *
>
> **(3) Removal and remand**
>
> **(A) In general**
>
> The [RTC], in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the [RTC] has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the [RTC] as conservator or receiver of such institution . . . .

Supreme Court, U.S.
FILED
SEP 19 1996
CLERK

No. 96-113

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., RONALD REIMER, KENNETH H. KOGER, CLIFFORD W. SHINKSI, BRENT MESSICK, ROBERT CREW, SHERMAN DREISESZUN, LELAND GERHART, I.I. OZAR, RAYMOND GIFFORD, HARRY S. JONAS, RANDALL M. NAY, FRANK SEBREE, TONY SALAZAR, PHILIP PISTILLI, MICHAEL K. RUSSELL, GAGE & TUCKER, PEAT, MARWICK, MITCHELL & CO., KPMG PEAT MARWICK, ROBERT SPENCE, THOMAS S. MORGAN, co-executor of the estate of FRANK S. MORGAN, MARILYN J. MORGAN, co-executor of the estate of FRANK S. MORGAN, ISABEL A. KIENE, executrix of the estate of RALPH E. KIENE, SHOOK, HARDY & BACON, C. PATRICK McLARNEY, substituted for SHOOK HARDY law firm, BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REIMER & KOGER RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

1. Whether a federal district court, exercising jurisdiction over an action under both 12 U.S.C. § 1441a(l), arising-under original jurisdiction, and 28 U.S.C. § 1367, supplemental jurisdiction, retains jurisdiction over the action despite the dismissal of the Resolution Trust Corporation as a party prior to trial.

2. Whether abstention principles are relevant when a federal district court has exclusive jurisdiction over an action removed under 12 U.S.C. § 1441a(l).

3. Whether a federal district court with jurisdiction over a removed action, may enjoin the filing of identical state court suits after such removal, when the state court suits are filed for the purpose of subverting removal jurisdiction.

4. Whether an actual case or controversy exists when the preliminary injunction appealed from has been superseded by a permanent injunction upon which a separate appeal has been taken.

RULE 29.6 STATEMENT

Respondent Reimer & Koger Associates, Inc. is a Kansas corporation which has no parent or subsidiary company. Respondents Kenneth H. Koger, Clifford W. Shinski, Brent Messick and Robert Crew are individuals.

TABLE OF CONTENTS

Questions Presented i

Rule 29.6 Statement ii

Table of Authorities iv

Opinions and Orders Below 1

Statutory Provisions Involved 2

Counterstatement of the Case 5

A. Procedural History 5

B. Injunctions 6

C. Eighth Circuit Affirmance 9

D. Subsequent Events 10

Reasons for Denying the Petition for Writ 11

1. Jurisdiction is Proper in the Federal Court 11

2. The Doctrines of Federal Abstention and Comity Are Not Relevant To The District Court's Power to Issue The Preliminary Injunctions 13

3. The District Court Had Authority to Issue the Preliminary Injunctions 14

4. KPERS' Issues Are Now Moot 18

Conclusion 19

TABLE OF AUTHORITIES

Cases **Pages**

Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear and Allied Workers' Union, 515 F.Supp. 456 (S.D.N.Y. 1981) 17

Brown v. Seaboard Coast Line Railroad Co., 309 F.Supp. 48 (N.D.Ga. 1969). 17, 18

Calesnick v. Redevelopment Auth., 696 F.Supp. 1053 (E.D. Pa. 1988) 17

California v. Keating, 986 F.2d 346 (9th Cir. 1993) 12

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) 9

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 14

Condor Corp. v. City of St. Paul, 912 F.2d 215 (8th Cir. 1990) 9

Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899 (5th Cir. 1975) 17

International Ass'n of Entrepreneurs of America v. Angoff, 58 F.3d 1266 (8th Cir. 1995), cert. denied, 116 S.Ct. 774 (1996) 10, 13

Juidice v. Vale, 430 U.S. 327 (1977) 14

Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993), cert. denied, 114 S.Ct. 2132 (1994) 4, 9, 10, 12, 13

Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 60 F.3d 1304 (8th Cir. 1995) 6

Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 61 F.3d 608 (8th Cir. 1995), cert. denied, 116 S.Ct. 915 (1996) 6, 11

Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 77 F.3d 1063 (8th Cir. 1996), reh'g denied, April 18, 1996 12

Kansas Public Retirement System v. Russell, Shawnee County, Kansas District Court Case No. 95 CV 936 6

Kansas Public Employees Retirement System v. KPMG Peat Marwick, Shawnee County, Kansas District Court Case No. 95 CV 937 6

Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980) 10, 13

Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987) 17

Mannings v. School Bd. of Hillsborough County, 796 F.Supp. 1491 (M.D. Fla. 1992) 17

Muskrat v. United States, 219 U.S. 346 (1911) 19

Myers v. Hertz Penske Truck Leasing, Inc., 572 F.Supp. 500 (N.D.Ga. 1983) 17

Northwest Airlines, Inc. v. American Airlines, Inc., 989 F.2d 1002 (8th Cir. 1993) 16, 18

National City Lines v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982) 10

Reliable Transfer Co. v. Gallahar, 54 F.Supp. 395 (S.D.Ga. 1944) 18

Rose v. Giametti, 721 F.Supp. 924 (S.D. Ohio 1989) 17

Spring Garden Associates, L.P. v. RTC,
26 F.3d 412 (3d Cir. 1994) 12

United Mine Workers v. Gibbs,
383 U.S. 715 (1966) 9

United States Fire Ins. Co. v. Goodyear
Tire & Rubber Co.,
920 F.2d 487 (8th Cir. 1990) 16

United States v. Telephone Co.,
434 U.S. 159 (1977) 17

Webb v. GAF Corp.,
78 F.3d 53 (2d Cir. 1996) (per curiam) 18

In Re Y&A Group Sec. Litigation,
38 F.3d 380 (8th Cir. 1994) 16

Younger v. Harris,
401 U.S. 37 (1971) 10, 13, 14

Statutes, Regulations and Scholarly Materials

12 U.S.C. §1441a(l) 2, 9, 11, 13

28 U.S.C. § 1367 ..... 3, 12

28 U.S.C. § 1446(d) 4, 15, 18

28 U.S.C. § 1651 ..... 4, 15

28 U.S.C. § 2283 ..... 4, 9, 10, 15

Kansas City Business Journal, September 8, 1995 7

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals being directly appealed is Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 77 F.3d 1063 (8th Cir. 1996), reh'g denied, April 18, 1996. (Petitioner's Appendix ("Pet. App.") pp. 1a-15a) The written order of the district court is unreported. The district court's order and partial transcripts of the district court's decisions are set forth in Pet. App. pp. 16a-35a.

Other decisions implicated by the issues raised by Petitioner are the Eighth Circuit's decision that the district court had original jurisdiction over this entire action, Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993) cert. denied, 114 S.Ct. 2132 (1994) (Respondent's Appendix ("Resp. App.") pp. 1a - 19a); the district court's order denying KPERS' third motion to remand, an unreported decision (Resp. App. pp. 20a - 27a); and the district court's order that the preliminary injunctions be made permanent, an unreported decision (Resp. App., pp. 28a - 33a).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1441a(l)(1) and 1441a(l)(3)(A) provide in relevant part:

> *(1)* **Power to remove; jurisdiction**
>
> **(1) In general**
>
> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [Resolution Trust Corporation] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.
>
> * * *
>
> **(3) Removal and remand**
>
> **(A) In general**
>
> The [Resolution Trust Corporation], in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the [Resolution Trust Corporation] has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the [Resolution Trust Corporation] as conservator or receiver of such institution . . . .

28 U.S.C. § 1367 provides in relevant part:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1446 provides in relevant part:

§ 1446. Procedure for removal

(d) Promptly after filing of such notice of removal of a civil action the defendant or defendants shall given written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

The All-Writs Act, 28 U.S.C. § 1651, provides in relevant part:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Kansas Public Employees Retirement System ("KPERS") filed this suit on June 5, 1991, in the District Court of Shawnee County, Kansas. Following several amendments, KPERS' claims ultimately focused on its investment in Home Savings Association of Kansas City, F.A., a Missouri-based savings and loan institution ("Home Savings"). Respondent Reimer & Koger Associates, Inc., by and through certain employees and representatives ("Reimer & Koger respondents"), was retained by KPERS to manage various high-risk direct placement investments, including the investment in Home Savings. The Reimer & Koger respondents were named as defendants in this suit in their capacity as investment managers for KPERS for that direct placement portfolio.

Contrary to KPERS' Statement of the Case, this suit never consisted of "civil fraud claims . . . pursued by Kansas in its sovereign capacity in lieu of a criminal prosecution." (Petition for Writ, p. 3) The Reimer & Koger respondents have never been sued for fraud. Nor is KPERS pursuing these claims in a "sovereign capacity." Indeed, the courts below have held that KPERS in making investments was acting in its proprietary, not governmental, capacity.

Following the Resolution Trust Corporation's ("RTC") removal of this action to district court, KPERS filed its first of three separate motions to remand. The district court denied that motion and the Eighth Circuit affirmed in October of 1993. Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d

614 (8th Cir. 1993), cert. denied, 114 S.Ct. 2132 (1994). (Resp. App. pp. 1a-19a) On June 30, 1994, the RTC was dismissed from the suit and KPERS argued its second motion to remand. That second motion was denied as well. (Pet. App. p. 3a) KPERS did not request a certification of the district court's decision of June 30, 1994 so as to take an appeal on the issue of jurisdiction. Subsequently, two more interlocutory appeals were taken to the Eighth Circuit without KPERS challenging jurisdiction. (Pet. App. p. 4a)

B. INJUNCTIONS

On July 27, 1995, the Eighth Circuit announced two decisions against KPERS in Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 61 F.3d 608 (8th Cir. 1995), cert. denied, 116 S.Ct. 915 (1996) and Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 60 F.3d 1304 (8th Cir. 1995). In an effort to avoid the possible ramifications of those decisions, KPERS mounted a two pronged assault on the district court's retention of jurisdiction over this case.[1]

On August 23, 1995, KPERS filed two parallel state court suits in Shawnee County, Kansas. In Kansas Public Retirement System v. Russell, et al., Case No. 95 CV 936, KPERS sued the Reimer & Koger respondents, Russell and Shook Hardy asserting identical causes of action and seeking identical damages as alleged in this suit. In Kansas Public Employees Retirement System v. KPMG Peat Marwick, Case No. 95 CV 937, KPERS sued Peat Marwick asserting identical causes of action and seeking

---

[1]It is this litigious assault waged by KPERS which has caused the delays of which KPERS complains in its Petition for Writ. (Petition for Writ, p. 6)

the identical damages alleged against Peat Marwick in this suit. (Pet. App. pp. 4a-5a)

The motivations for KPERS' actions were not left to conjecture. On September 8, 1995, KPERS' counsel, Eugene Pavilon, was quoted in the Kansas City Business Journal regarding KPERS' reasons for filing the parallel actions:

> Frankly, the reason we did this is because there are multitude of problems and issues that are causing delays in federal court, coupled with what we think is an erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations. [Emphasis added.]

(Pet. App. p. 4a)

On September 12, 1995, KPERS filed its third motion to remand this case and its second motion for reconsideration on issues relating to the statute of limitations.

In response to the duplicative parallel state court actions, the district court issued four preliminary injunctions on September 29, 1995. Those preliminary injunctions prohibited KPERS from filing additional suits arising out of the Home Savings investment against the Reimer & Koger respondents, Shook Hardy, Blackwell Sanders and Peat Marwick.[2] KPERS improperly characterizes the purpose of those injunctions as solely

---

[2]The Peat Marwick injunction also stayed the parallel state court suit which was still pending in state court. The other parallel state court suits had been removed to federal court prior to consideration of the injunctions.

being to protect the district court's supplemental jurisdiction. In fact, the district court stated that the injunctions would issue for the following reasons:

> Insofar as the future assertion of claims against these defendants are concerned, in cases filed in Kansas in the future, there has been no compelling circumstance presented which would prevent the application of the first-filed rule. * * * Granting injunctive relief furthers the general federal policy against multiplicity of litigation and furthers the policies of most states against multiplicity of litigation; comports with common sense; protects and furthers the ability of this court to as efficiently and as economically as possible resolve the issues raised in this case against these defendants free of the distractions, which the track record of this case demonstrate fully occur when efforts are made to assert the same claims in other courts.

(Pet. App. pp. 27a-28a)

KPERS filed its notice of appeal from these injunctions on October 2, 1995. Rather than arguing its third remand motion in the district court, KPERS attempted to backdoor its remand argument into its appeal from the injunctions.

Despite KPERS' efforts, the district court took up and again denied the third request for remand. (Resp. App. pp. 20a-27a) The court found that it had both original and supplemental jurisdiction of the case and

would continue to exercise that jurisdiction. KPERS has not sought certification of that order so as to take an interlocutory appeal, but rather raises those issues herein.

C. EIGHTH CIRCUIT AFFIRMANCE

The Eighth Circuit considered and rejected each of the three questions presented by KPERS in its Petition for Writ. On the first issue, the Eighth Circuit affirmed the district court's decision that it had both original "arising-under" jurisdiction of the entire case under 12 U.S.C. § 1441a*(1)* and supplemental jurisdiction under 28 U.S.C. § 1367, despite the dismissal of the RTC. With respect to original jurisdiction, the Eighth Circuit was merely reaffirming its previous decision on the same point, a decision for which certiorari was denied by this Court. Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993), cert. denied, 114 S.Ct. 2132 (1994). (Resp. App. 1a- 19a) Thus, even if the district court improperly exercised supplemental jurisdiction, it was not without jurisdiction over this case.

Despite such a conclusive holding, the Eighth Circuit further ruled that KPERS could not prevail even if the jurisdictional analysis relied solely upon the decision of the district court to exercise supplemental jurisdiction. The Eighth Circuit held that the question of whether to retain a case after dismissing federal claims is discretionary, not jurisdictional (citing United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349 (1988); Condor Corp. v. City of St. Paul, 912 F.2d 215 (8th Cir. 1990)). (Pet. App. pp. 5a-7a)

With respect to the second issue raised by KPERS

in its Petition for Writ, the Eighth Circuit held that abstention under Younger v. Harris, 401 U.S. 37 (1971) is inapplicable where a federal court has exclusive jurisdiction over a claim (citing International Ass'n of Entrepreneurs of America v. Angoff, 58 F.3d 1266, 1271 (8th Cir. 1995), cert. denied, 116 S.Ct. 774 (1996); Levy v. Lewis, 635 F.2d 960, 967 (2d Cir. 1980)). (Pet. App. pp. 13a-14a) Because the Eighth Circuit had previously held in Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993), cert. denied, 114 S.Ct. 2132 (1994) that the district court had exclusive jurisdiction over the entire case under 12 U.S.C. § 1441a, it found that Younger abstention was inappropriate.

Finally, with respect to the third issue raised by KPERS in its Petition for Writ, the Eighth Circuit held that the district court's injunction in favor of the Reimer & Koger respondents was not precluded by the Anti-Injunction Act, 28 U.S.C. § 2283, because the parallel state court action had since been removed to federal court. The court found that the Anti-Injunction Act does not apply if there is no state litigation in progress when the federal court issues its injunction (citing National City Lines v. LLC Corp., 687 F.2d 1122, 1127 (8th Cir. 1982)). (Pet. App. p. 8a)

D. SUBSEQUENT EVENTS

Subsequent to the entry of the Eighth Circuit opinion being challenged here, the district court ordered that the preliminary injunctions of which KPERS complains be made permanent. (Resp. App. pp. 28a- 33a). That order is currently the subject of appeal filed by KPERS.

REASONS FOR DENYING THE PETITION FOR WRIT

1. JURISDICTION IS PROPER IN THE FEDERAL COURT

KPERS phrases its first question in a light which is misleading and implies that the district court lacked subject matter jurisdiction over this action. The Eighth Circuit did state that the question of whether a federal court should exercise supplemental jurisdiction to retain a removed action after dismissal of the federal claims is discretionary, not jurisdictional. The court explained that the existence of jurisdiction is determined at the time of removal. (Pet. App. pp. 5a-7a) However, this ruling was purely academic. The district court has both original and supplemental jurisdiction over this case. As explained by the district court in its denial of KPERS' third motion to remand:

> . . . KPERS mistakenly asserts that supplemental jurisdiction is the only basis for this court's jurisdiction over this case. In addition to the proper exercise of supplemental jurisdiction, this court has original jurisdiction over all of the claims asserted in this case. In KPERS v. Reimer & Koger, 61 F.3d 608, 610 (8th Cir. 1995), the court stated with regard to a case removed to federal court by the RTC under the Financial Institutions Reform, Recovery and Enforcement Act: "Under § 1441a(1), any suit to which the RTC is a party is 'deemed to arise under the law of the United States,' and the district courts therefore have original jurisdiction over

> such suits. This grant of jurisdiction includes the entire suit, even though the RTC was only a third-party defendant."
>
> Because § 1441(a)(1) provides federal jurisdiction over all the claims contained in this case, there is no need to inquire into supplemental jurisdiction when the federal claims are dismissed. See Spring Garden Associates, L.P. v. RTC, 26 F.3d 412, 417 (3d Cir. 1994); see also California v. Keating, 986 F.2d 346, 348-49 (9th Cir. 1993) (adding the RTC to a case "transforms the entire action into one that 'arises under' the laws of the United States.). Therefore, original jurisdiction exists over the claims remaining after the RTC was dismissed.
>
> On the other hand, if supplemental jurisdiction is required, I continue to believe that the factors of economy, convenience, fairness and comity weigh unmistakably in favor of exercising supplemental jurisdiction over the state law claims. See 28 U.S.C. § 1367(e).

(Resp. App. pp. 23a-24a)

The original jurisdiction of the district court is an issue twice affirmed by the Eighth Circuit and on which certiorari has already once been denied by this Court. Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993) cert. denied, 114 S.Ct. 2132 (1994) (Resp. App. pp. 1a - 19a); Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 77 F.3d 1063 (8th Cir. 1996) reh'g denied, April

18, 1996 (Pet. App. 1a-15a) Thus, the subject-matter jurisdiction of the district court over this action is an issue which has been conclusively determined.

2. THE DOCTRINES OF FEDERAL ABSTENTION AND COMITY ARE NOT RELEVANT TO THE DISTRICT COURT'S POWER TO ISSUE THE PRELIMINARY INJUNCTIONS

KPERS' second question pleads for the application of the principles of abstention and comity. As phrased, KPERS again misleads this Court by implying that such principles were required to be considered by the federal court in issuing its injunctions. Again, KPERS' argument ignores the district court's original jurisdiction under 12 U.S.C. § 1441a.

KPERS' argument on this point was summarily dismissed by the Eighth Circuit because abstention under Younger v. Harris, 401 U.S. 37 (1971) is inappropriate where a federal court has exclusive jurisdiction over a case (citing International Ass'n of Entrepreneurs of America v. Angoff, 58 F.3d 1266, 1271 (8th Cir. 1995), cert. denied, 116 S.Ct. 774 (1996); Levy v. Lewis, 635 F.2d 960, 967 (2d Cir. 1980)). (Pet. App. pp. 13a-14a) Because the Eighth Circuit had previously held in Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993), cert. denied, 114 S.Ct. 2132 (1994) that the district court had exclusive jurisdiction over the entire case under 12 U.S.C. § 1441a, it found Younger abstention was inappropriate.

Even if the doctrine of abstention were applicable, it is an extraordinary and narrow exception to the duty of a federal district court to decide the controversy before

it. Colorado River Water Conservation District v. United States, 424 U.S. 800, 812, (1976). Abstention from the exercise of federal jurisdiction is the exception rather than the rule. Id.

KPERS has not presented the court with the exceptional circumstances required to justify abstention. In this case, KPERS seeks money damages under various tort and contract theories. This case does not involve a complex state regulatory scheme. Nor does this case concern a state effort to establish a coherent policy with respect to a matter of substantial public concern. Instead, KPERS simply desires to recover its alleged loss on an investment, which was part of a high-risk, but overall profitable investment program. Such circumstances do not warrant abstention.

The cases cited by KPERS to support its abstention theory are inapplicable. In Younger v. Harris, 401 U.S. 37 (1971) and Juidice v. Vale, 430 U.S. 327 (1977), lawsuits were brought in federal court to enjoin state court activity. In Younger, the injunction interferred with the operation of the state's criminal justice system. In Juidice, the injunction restrained the state's contempt mechanisms. Here, KPERS' opportunity to prosecute its claim has not been interfered with or restrained.

The doctrines of abstention and comity are inapplicable where the federal court has exclusive jurisdiction over the case. Even if such doctrines were applicable, the requirements for abstention have not been met by KPERS.

3. THE DISTRICT COURT HAD AUTHORITY TO ISSUE THE PRELIMINARY INJUNCTIONS

KPERS inaccurately states that the Eighth Circuit upheld "all the injunctions" under the theory that 28 U.S.C. § 1446(d) directs that a state court must "proceed no further" once a case is removed to federal court. (Petition for Writ, p. 16) In fact, Section 1446(d) was only considered in relation to the Peat Marwick injunction, not the injunction granted to the Reimer & Koger respondents.

The Eighth Circuit's analysis began by questioning whether the Anti-Injunction Act, 28 U.S.C. § 2283, precluded the issuance of the injunctions in question. Because the injunctions granted to the Reimer & Koger respondents, Shook Hardy and Blackwell Sanders, were all granted after the parallel state court suits were removed to federal court, the Anti-Injunction Act was found to be inapplicable. (Pet. App., p. 8a)

Only the Peat Marwick injunction arguably fell within the constraints of the Anti-Injunction Act, as the parallel suit against Peat Marwick was still pending in state court. In analyzing whether the district court erred in granting that injunction, the Eighth Circuit looked to 28 U.S.C. § 1446(d) as an exception to the Anti-Injunction Act. (Pet. App., pp. 8a-12a) Section 1446(d) was never considered, and was wholly irrelevant, to the determination of the appropriateness of the injunction granted to the Reimer & Koger respondents.

In initially granting the injunction prohibiting KPERS from filing state court suits against the Reimer & Koger respondents arising out of the Home Savings investment, the district court ruled that the All Writs Act,

28 U.S.C. § 1651(a) granted broad injunctive powers to the federal courts, "and among those powers [was] the power to control parties before [the district] court in the filing of duplicative and disruptive litigation." (Pet. App. p. 26a) Once vested with such authority, the court then turned its attention to the appropriate standard for determining whether to grant the requested injunction.

Referring to Northwest Airlines, Inc. v. American Airlines, Inc., 989 F.2d 1002 (8th Cir. 1993) and United States Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487 (8th Cir. 1990), the district court relied upon the well-established rule that in cases of concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case and that, in the absence of compelling circumstances, the first-filed rule should apply. The court then went on to find that no such compelling circumstances had been presented by KPERS. In fact the court found compelling circumstances for applying the first-filed rule and granting the injunctions:

> Granting injunctive relief furthers the general federal policy against multiplicity of litigation and furthers the policies of most states against multiplicity of litigation; comports with common sense; protects and furthers the ability of this court to as efficiently and as economically as possible resolve the issues raised in this case against these defendants free of the distractions, which the track record of this case demonstrate fully occur when efforts are made to assert the same claims in other courts.

(Pet. App. pp. 27a-28a)

The All Writs Act grants broad injunctive powers to federal judges. In re Y&A Group Sec. Litigation, 38 F.3d 380, 382 (8th Cir. 1994). The Act grants power to "issue such commands . . . necessary . . . to effectuate and prevent the frustration of orders [the court] has previously issued." United States v. Telephone Co., 434 U.S. 159, 172 (1977). The Act is also designed to prevent harassment or interference with the progress of litigation pending before the court. See, e.g., Rose v. Giametti, 721 F.Supp. 924, 927-28 (S.D. Ohio 1989) ("Act is generally invoked to protect and preserve the jurisdiction of the court against actions which would frustrate or impinge on its administration of pending litigation" or render it meaningless); Mannings v. School Bd. of Hillsborough County, 796 F.Supp. 1491, 1495-96 (M.D. Fla. 1992) ("federal court should not permit state court proceedings to frustrate effective disposition of the case where the proceedings in a federal court have been ongoing for several years"); and Calesnick v. Redevelopment Auth. 696 F.Supp. 1053, 1055 (E.D. Pa. 1988) (Act provides broad power to grant injunctions necessary to prevent harassment of individuals through repeated filings of baseless complaints).

A federal court may issue an injunction to stay parallel proceedings in a state court where the plaintiff has attempted to defeat federal jurisdiction by filing substantively the same suit in state court following removal. Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987); Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899, 901 (5th Cir. 1975); Myers v. Hertz Penske Truck Leasing, Inc., 572 F.Supp. 500, 501 (N.D.Ga. 1983), Brown v. Seaboard Coast Line Railroad Co., 309 F.Supp. 48 (N.D.Ga. 1969); See also, Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear and Allied Workers' Union, 515 F.Supp. 456, 460 (S.D.N.Y. 1981). "If it were otherwise, in removed

cases the whole purpose of the removal statute could be frustrated by renewal of the suits in the state court." Brown, 309 F.Supp. at 49 (quoting Reliable Transfer Co. v. Gallahar, 54 F.Supp. 395, 396 (S.D.Ga. 1944).

In this case, the RTC properly removed this suit from Shawnee County, Kansas to the district court. KPERS sought remand, which was denied by the district court. The district court was affirmed by the Eighth Circuit. Following the dismissal of the RTC as a party, KPERS again sought remand. This second request was again denied. The filing of substantially identical proceedings in Shawnee County, Kansas was a blatant attempt by KPERS to evade federal jurisdiction, avoid various district and appellate court decisions, and totally frustrate the purposes of the removal statutes.

The district court has full authority under the All Writs Act to grant injunctive relief where appropriate. Under the first-filed standard articulated in Northwest Airlines, supra, injunctive relief was appropriate against the filing of future cases by KPERS asserting any claims arising out of KPERS' investments in Home Savings Association. The issue raised by KPERS and its arguments relating to 28 U.S.C. § 1446(d) need not be considered with respect to the injunction granted to the Reimer & Koger respondents.

4. KPERS' ISSUES ARE NOW MOOT

On July 22, 1996, the district court ordered that the preliminary injunctions of which KPERS objects be made permanent. (Resp. App. pp. 28a-33a) KPERS has appealed the entry of the permanent injunctions to the Eighth Circuit. Because the preliminary injunctions have been superseded by permanent injunctions, this appeal

has become moot. E.g., Webb v. GAF Corp., 78 F.3d 53, 56 (2d Cir. 1996) (per curiam). Where an appeal becomes moot, no case or controversy exists upon which this Court may act. E.g., Muskrat v. United States, 219 U.S. 346, 355 (1911).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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TABLE OF APPENDICES

APPENDIX A

Decision of the United States Court of Appeals for the Eighth Circuit, dated September 2, 1993 ..... 1a

APPENDIX B

Order of the United States Supreme Court Denying Petition for Writ of Certiorari 19a

APPENDIX C

Order of the United States District Court for the Western District of Missouri Filed October 25, 1995 ..... 20a

APPENDIX D

Order of the United States District Court for the Western District of Missouri Filed June 22, 1996 ..... 28a

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-1794

Kansas Public Employees Retirement System, Plaintiff-Appellant, v. Reimer & Koger Associates, Inc., a Kansas Corporation; Ronald Reimer, an individual; Kenneth H. Koger, an individual; Clifford W. Shinaki, an individual; Brent Messick, an individual; Robert Crew, an individual; Frank Morgan, an individual; Sherman Dreiseszun, an individual; Leland Gerhart, an individual; I.I. Ozar, an individual; Raymond Gifford, an individual; Harry S. Jonas, an individual; Ralph E. Kiene, an individual; Randall M. Nay, an individual; Frank Sebree, an individual; Tony Salazar, an individual; Philip Pistilli, an individual; Michael K. Russell, an individual; Gage & Tucker, a law partnership; Peat, Marwick, Mitchell & Co. , an accountancy firm; KPMG Peat Marwick, an accountancy firm; Robert Spence, an individual; Defendants-Appellees.	*	Appeal from the United States District Court for theWestern District of Missouri.

Frank Morgan; Sherman Dreiseszun; Leland Cerhart; I.I. Ozar; Raymond Gifford; Ralph E. Kiene; Randall M. Nay; Tony Salazar; Philip Pistilli,	*
Third-Party Plaintiff-Appellees,	*
v.	*
Resolution Trust Corporation,	*
Third-Party Defendant-Appellee.	*

Submitted: June 14, 1993
Filed: September 2, 1993

Before MCMILLIAN, JOHN R. GIBSON, and HANSEN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The Kansas Public Employees Retirement System appeals from a district court[1] order denying its motion to remand this action to a Shawnee County, Kansas, district court. KPERS argues that because the state court severed the original claims from the third-party claims before the third-party defendant, the Resolution Trust Corporation, removed the case to federal court, only the third-party claims could be removed. KPERS also argues that the

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[1]The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

district court erred in holding that the third-party plaintiffs' claim for indemnification against the RTC was not frivolous under 12 C.F.R. § 545.121 (1992). We affirm.

On June 5, 1991, KPERS filed suit in the District Court of Shawnee County, Kansas, to recover damages resulting from the purchase of Home Savings Association debentures for the Kansas Employees' Retirement Fund. KPERS named Michael K. Russell (its former board chairman) , Reimer & Koger Associates (its former investment advisor) , Peat, Marwick, & Mitchell Company (its former accounting firm) , Gage & Tucker (its former law firm) , and the Home Savings Association's officers and directors[2] as defendants. Along with various allegations of fraud, breach of fiduciary duty, professional negligence, and gross negligence, KPERS claimed that the Home Savings directors violated the Kansas Securities Act, Kan. Stat. Ann. § 17-1268 (1983) . In response, the Home Savings directors moved to dismiss KPERS' claims as derivative of claims that belonged solely to the RTC, and argued that the RTC was a necessary party.

Shortly thereafter, the RTC moved for leave to intervene in order to remove the action to federal court, where the RTC would attempt to have the case dismissed. On August 21, 1992, the Kansas district court denied the Home Savings directors' motion to dismiss and held that KPERS' claims were nonderivative. The Kansas court never ruled on the RTC's motion requesting leave to intervene.

On October 2, 1992, the Home Savings directors

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[2]Frank Morgan, Sherman Dreiseszun, Leland Gerhart, I.I. Ozar, Raymond Gifford, Ralph E. Kiene, Randall M. Nay, Tony Salazar, and Philip Pistilli.

filed a third-party petition against the RTC, claiming negligent mismanagement of Home Savings, which caused a loss of funds that could have been used to repay part of the KPERS investments, and seeking indemnification under 12 C.F.R. § 545.121. On October 8, 1992, at approximately 4:00 p.m., KPERS' counsel contacted the Shawnee County district court clerk to discuss the filing of a motion to strike the third-party claims or sever them from the original claims. The clerk advised the lawyers that the office would remain open after the normal 5:00 p.m. closing to permit the filing of pleadings. KPERS' counsel also contacted the chambers of the district judge handling the case, stating that KPERS "desired to present [a] severance motion to the . . . court for ex parte consideration that day." Opposing counsel were not notified.

At 5:26 p.m., KPERS' counsel appeared ex parte before the Kansas district judge to present its motion to strike the third-party petition or, alternatively, sever the third-party claims from the original lawsuit. The Kansas district judge stated:

> The Court is familiar with the history of this case, [and] feels that under the circumstances the addition of the Resolution Trust Corporation . . . by the third-party petition would subject this case to removal under the federal statutes .... [T]he Court [does] not feel that . . . to maintain [the third-party claims] in the same case [as the principal claims] and subjecting [the entire] case to removal would be in the best interests of the advancement of the princip[al] case. . . . I . . .sign ex parte the order to sever and

> direct . . . that the third party claim be severed and filed . . . as a separate case entirely from the previous [case]. . . [T]he Court considers this matter on an emergency basis.

The judge also provided that any aggrieved party could file a motion for reconsideration and the court would consider such motions along with KPERS' motion to dismiss the third-party claims.

None of the parties filed a motion for reconsideration. Instead, five days after the Kansas court entered the severance order, the RTC filed a notice of removal for the entire case—both the original and third-party claims. In response, KPERS asked the federal district court to remand the "original case" to the Kansas court because the RTC was no longer a party to that action. The district court held a hearing on KPERS' motion for remand, and asked KPERS' counsel about the motivation behind the severance and whether the defendants' counsel had been called before the ex parte proceeding occurred:

> THE COURT: [T]here was time to call the clerk's office and make this arrangement, but there was not time to call any other lawyer and suggest, "Hey, you might want to get over here because we're going to present this to the judge."
>
> MR. DEACY: That's so, as I understand it, Your Honor.
>
> THE COURT: And there was an emergency.

MR. DEACY: It was an emergency.

THE COURT: What was the emergency?

MR. DEACY: The emergency was that so long as the cases were one case, the RTC could remove it all.

THE COURT: And they could — had that right under federal law to do so.

MR. DEACY: They had the right under federal law so long as they were a party to the case.

THE COURT: Right. And so the emergency was to do something quickly to prevent the RTC from removing the case?

MR. DEACY: That's right, Your Honor.

KPERS' counsel also assured the district court that the Kansas judge severed the case specifically to prevent removal:

THE COURT: And it stated that the reason the judge is doing this is to, in essence, to prevent the RTC from removing the case.

MR. DEACY: No question about it.

. . .

THE COURT: . . . [T]he only reason the judge gave for entering the severance order on an emergency basis was to prevent the RTC from removing the case, which everybody believed the RTC had the right to do at the instant before the judge signed this order.

MR. DEACY: Before the severance, yes, Your Honor. That's right. . .

. . .

THE COURT: . . . KPERS' position, as I understand it, is that but for the order that the judge entered, the case would have been removed by the RTC, KPERS and the judge did not want it removed by the RTC, and so this order was entered, . . . not severing the third party petition or complaint for a separate trial, but severing it into another case.

MR. DEACY: That's true, Your Honor.

Ruling from the bench, the district court emphasized that the Kansas court's only stated reason for severing the action into two separate cases was to defeat the RTC's ability to exercise its right to remove the entire action to federal court. The district court determined that granting severance for the sole purpose of defeating a congressionally conferred right violated the Supremacy Clause, U.S. Const. art. VI, cl. 2. Thus, the court held that the severance order was void and the

entire case could be removed to federal court. In addition, the court stated that it was not bound by state procedural maneuverings in determining whether it had subject matter jurisdiction. The court held that the RTC had the right to remove the entire case, even though it was a third-party defendant, and that a state court could not defeat that right by using a mere procedural maneuver—arbitrarily dividing one case into two separate cases. Finally, the court rejected KPERS' argument that the third-party claims were frivolous and thus not within the district court's subject matter jurisdiction. The court reasoned that because the RTC, as receiver, was a successor of Home Savings, it could be liable for indemnification of the Home Savings directors under 12 C.F.R. § 545.121. The district court then certified the matter for interlocutory appeal.

I.

On appeal, KPERS argues that the district court erred in holding that the severance order was void for violation of the Supremacy Clause. More specifically, KPERS contends that the district court did not have the right to review the Kansas court's severance order in determining whether to remove the original and third-party actions; that the Kansas court's order effectively divided the cases, the RTC was no longer a party to the original action, and thus, the RTC had no congressionally conferred right to remove it; and that the severance order did not frustrate any congressional purpose, and any conflict that might have existed between the severance and the RTC's right to remove was illusory.

Whether a case is removable is a question of federal law to be decided by the federal courts. See Harrison v. St. Louis & San Francisco R.R. Co., 232 U.S. 318, 329 (1914);

see also Terral v. Burke Constr. Co., 257 U.S. 529, 557-58 (1922); Stoll v. Hawkeye Casualty Co., 185 F.2d 96, 99 (8th Cir. 1950). The district court therefore had jurisdiction to decide whether the RTC could remove the original and third-party actions under 12 U.S.C. § 1441a(l).[3] Likewise, we have jurisdiction to determine whether the district court properly decided to allow removal, and we review the district court's decision de novo.

To determine whether the RTC could remove both the original and third-party claims, the district court had to examine the procedural status of the "cases" as of the date the RTC requested removal. See Pullman Co. v. Jenkins, 305 U.S. 534, 540 (1939). In so doing, the district court had to decide whether the Kansas court's severance order created two separate and distinct cases and caused the RTC to be a named party to the third-party action, but a "stranger" to the original action. Thus, the district court did not review the Kansas court's order for "correctness" under Kansas law or in the sense that an appellate court might review a trial court. Instead, the district court examined the order as an integral part of its removal decision relating to both the original and third-party claims.[4] See Harrison, 232 U.S. at 329.

In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act, giving the RTC the right to remove cases to federal court:

[3]The RTC removed the action to the United States District Court for the Western District of Missouri because Home Savings principal place of business was located in Kansas City, Missouri. See 12 U.S.C. § 1441a(l) (3) (A)

[4]Although some of the appellees urge that the Kansas court's actions are void because they did not comply with Kansas law, we decline to discuss this issue as it takes us beyond the review necessary for determining whether removal is appropriate.

> The Corporation, in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the corporation has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the Corporation as conservator or receiver of such institution.

12 U.S.C. § 1441a(l) (3) (A) (Supp. III 1991). When the Home Savings directors brought the RTC into the action as a third-party defendant, the RTC had the right to remove "the entire case" to federal court. California v. Keating, 986 F.2d 346, 348-49 (9th Cir. 1993) (emphasizing that the RTC could remove the entire action at any time); see also In re Surinam Airways Holding Co., 974 F.2d 1255, 1260 (11th Cir. 1992) (holding that a foreign state third-party defendant's removal under 28 U.S.C. § 1441(d) (1988) entitled it to remove the entire case, not just the third-party claims against it); Nolan v. The Boeing Co., 919 F.2d 1058, 1066 (5th Cir. 1990) (concluding that when a foreign state third-party defendant removes under § 1441(d), "it removes not just the third-party claims but the main claims as well") , cert. denied, 111 S. Ct. 1587 (1991)

KPERS agrees with the analysis to this point. In fact, this is admittedly why KPERS went to the Kansas

court to request severance on an "emergency" basis, and why the Kansas court granted the ex parte order. KPERS argues that once the Kansas court divided the case, the RTC was no longer a party to the original action and only had a right to remove the separate, third-party action. The appellees, on the other hand, contend that the Supremacy Clause renders the severance order void.

The Supremacy Clause provides that the Constitution "and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Thus:

> when state law touches upon the area of federal statutes enacted pursuant to constitutional authority, "it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law. This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power."

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 479-80 (1974) (citations omitted) . In addition, "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'" Howlett v. Rose, 496 U.S. 356, 368 (1990). "An excuse that is inconsistent with or violates federal law," however, "is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." Id.

It is also well established that states cannot directly or indirectly prevent, defeat, or limit the free exercise of

the right to remove. Goldey v. Morning News, 156 U.S. 518, 523 (1895) (stating that the state legislature and judiciary can neither defeat the congressionally conferred right to remove a case from state court to federal court, nor limit the effect of such removal); see also Terral, 257 U.S. at 532; Harrison, 232 U.S. at 328. Likewise, the federal courts should not condone a procedure intended to prevent removal when a party has the right to remove. See Wecker v. National Enamelling & Stamping Co., 204 U.S. 176, 185-86 (1907); see also Anderson v. Home Ins. Co., 724 F.2d 82, 83-84 (8th Cir. 1983) (joinder to deprive federal courts of jurisdiction is fraudulent and will not prevent removal).

Congress gave the RTC a broad right to remove any action, and until the Kansas court acted ex parte with the stated purpose of limiting the RTC's right to remove, the RTC could have removed the entire case to federal court. As KPERS' counsel admitted in his discussion with the district court and in his brief before this court, the Kansas court intended to keep the original action in state court by preventing the RTC from exercising its federal right to remove On its face the Kansas court's order violates the Supremacy Clause. We conclude that the district court did not err in holding the severance order void.

Nevertheless, even if we assume the Kansas court effectively severed the action into two cases, that procedural maneuver did not divest the RTC of its interest in the original action. Under both the Kansas and Federal Rules of Civil Procedure, a "third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim." See Kan. Stat. Ann. § 60-214 (1983); Fed. R. Civ. P. 14(a). Because a third-party defendant cannot relitigate the question of a

third-party plaintiff's liability to the original plaintiff, this provision protects the third-party defendant against any prejudice that might result from the third-party plaintiff's failure to assert a particular defense against the original plaintiff. See, e.g., United States v. Lumbermens Mut. Casualty Co., 917 F.2d 654, 658 n.5 (1st Cir. 1990) (allowing a third-party defendant that was not a "party" to the original action to raise on appeal claims of error based in the original action); Glick v. White Motor Co., 458 F.2d 1287, 1291 n.7 (3d Cir. 1972) (permitting the third-party defendant to take part in the trial and to examine and cross-examine witnesses as the rules of evidence permit) ; F & D Property Co. v. Alkire, 385 F.2d 97, 100 (10th Cir. 1967) (stating that "a third party defendant is in the lawsuit as an adverse a party to the same extent as the defendant and must act accordingly"); Williams v. Keyes, 125 F.2d 208, 209 (5th Cir.), cert. denied, 316 U.S. 699 (1942); 6 Charles A. Wright et al., Federal Practice & Procedure § 1457 (2d ed. 1990). The provision also reduces the possibility of collusion between the plaintiff and the third-party plantiff.[5] See Wright, supra.

In Nolan, the Fifth Circuit addressed a similar question regarding the removability of an action involving a foreign state that had been named as a third-party defendant. 919 F.2d at 1061. The state court in Nolan ordered severance of the third-party claims in an ex parte proceeding. Id. The third-party defendant removed "the entire case," the district court refused to remand, and the plaintiffs appealed. Id. The Fifth Circuit determined that 28 U.S.C. § 1441(d) granted a foreign state the right to remove an entire action, not just the claims against it,

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[5]These same reasons answer KPERS' argument that the severance order did not conflict with the congressional objective of giving the RTC the right to remove.

regardless of severance. Id. at 1065. The court found no significant difference between the authorization for removal of an entire action by a sovereign co-defendant, and removal of an entire action by a sovereign third-party defendant. Id. In fact, the court determined that the third-party's interests in removal may be more compelling because its liability is logically dependent on the liability of the defendant in the original action—to fully protect itself the third-party defendant may be called upon to assert defenses on behalf of the defendant. Id.

Thus, once the Home Savings directors brought the RTC into the action as a third-party defendant, the RTC became inextricably involved in the entire action—both the original and third-party claims. Although both the Kansas and Federal Rules of Civil Procedure allow a court to sever the third-party claims from the original claims, such severance does not exclude the third-party defendant from participation in the original action nor deprive it of its ability to exercise its congressionally conferred right to remove the entire case to federal court. See Nolan, 919 F.2d at 1065.

II.

KPERS next argues that the district court erred in holding that the Home Savings directors' indemnification claim against the RTC is not frivolous.

In Bell v. Hood, 327 U.S. 678, 682-83 (1946), the Supreme Court stated:

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a proper cause of action on which [the plaintiff] could actually

> recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. . . . [A] suit may sometimes be dismissed[, however,] for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

(citations omitted); see also Hagans v. Lavine, 415 U.S. 528, 536-37, 542-43 (1974).

As we stated earlier, the Home Savings directors' third-party petition against the RTC contains two counts. First, the directors claim that the RTC negligently mismanaged Home Savings after it took control. The directors also claim that if they are found liable in the original action with KPERS, they are entitled to indemnification from Home Savings under 12 C.F.R. § 545.121, and the RTC assumed this liability as a receiver under 12 U.S.C. § 1821(d) (1988). Thus, even if we were

to strike the second claim as legally frivolous in accordance with KPERS' arguments, the district court would still retain jurisdiction over the entire case as the negligent mismanagement claim would remain.

KPERS relies on our decisions in Condor Corp. v. City of St. Paul, 912 F.2d 215 (8th Cir. 1990), and Adams v. Resolution Trust Corp., 927 F.2d 348 (8th Cir.), cert. denied, 116 L.Ed.2d 41 (1991), as well as the Fifth Circuit's decision in First Indiana Federal Savings Bank v. Federal Deposit Insurance Co., 964 F.2d 503 (5th Cir. 1992), to support its argument that even if the Home Savings defendants could prevail on their indemnification claim against the RTC as successor, there are no Home Savings assets with which the RTC could satisfy the judgment, and therefore, the claim is moot and frivolous.[6] The complaints in Condor, Adams, and First Indiana Savings, however, did not contain an alternative, direct claim against the defendant as this third-party complaint contains. The plaintiffs in Condor, Adams, and First Indiana Savings had only indirect claims against a receiver or successor—claims derived from the original institution's liability to the plaintiffs. Striking the indirect claims in those cases disposed of the entire matter. In contrast, the Home Savings directors have asserted a negligent mismanagement claim directly against the RTC, and as we stated earlier, whether the district court erred by concluding that the indemnification claim was not

---

[6]The Home Savings defendants point out that the "frivolousness test" may not apply at all given the RTC's special removal statute, which would allow the RTC access to the federal courts regardless of the nature of the claim. We need not answer this question, however, because we have determined that the court retains jurisdiction over the entire action regardless of whether the indemnification claim is frivolous.

frivolous is not of import regarding removal jurisdiction as the mismanagement claim would survive a decision to strike and the court would retain jurisdiction. Under either count of the third-party claim, the RTC may participate in the original case and assert defenses on behalf of the Home Savings directors, contending that the directors were not liable for the KPERS loss.[7] Thus, we need not consider at length the arguments regarding the indemnification claim.

Section 545.121 requires that a federal savings association indemnify its directors, officers, and employees for liability and costs they may incur as a result of their position. 12 C.F.R. § 545.121. The district court determined that some of the claims against the Home Savings directors could be characterized as negligence or strict liability claims that might entitle the Home Savings directors to indemnification. The court concluded that the RTC, as a receiver of Home Savings, was a successor to Home Savings, 12 U.S.C. § 1821(d) (1988), and therefore, might be liable for indemnification of the directors, officers, or employees under 12 C.F.R. § 545.121. In addition, the RTC concedes that the claims are not frivolous, the Kansas court did not strike the third-party claims as KPERS requested in its motion to strike or alternatively sever the third-party claims, and the parties submitted lengthy briefs with opposing arguments regarding the merits of the claim and the Home Savings directors' ability to collect on a judgment. Under these circumstances, we cannot say the third-party claims are "so patently without merit as to justify . . . the court's

---

[7]Whether the assertion of such defenses is strategically wise is not for us to decide. We merely keep the avenues open to permit the RTC to assert whatever defenses it wishes.

dismissal for want of jurisdiction." Bell, 327 U.S. at 683; Hagans, 415 U.S. at 542-43. The RTC may, if it deems appropriate, request dismissal of either or both claims under Fed. R. Civ. P. 12(b) (6) for failure to state a claim, or move for summary judgment. The outcome of these motions,[8] however, would not defeat the district court's jurisdiction as each is considered a ruling on the merits. See Bell, 327 U.S. at 682-83.

Accordingly, we affirm the order of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

[8]We express no opinion regarding the merits of the claims or the ability of the claims to survive a motion to dismiss under Fed. R. Civ. P. 12(b) (6). See Hagans, 415 U.S. at 542 n.10.

UNITED STATES SUPREME COURT

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., et al.

No. 93-1307
May 31, 1994

Case below, 4 F.3d 614

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, Plaintiff,	)
v.	)
REIMER & KOGER ASSOCIATES, INC., et al.,	)
Defendants,	)
FRANK MORGAN, et al.,	) No. 92-0922-CV-W-9
Defendants and Third-Party Plaintiffs,	)
v.	)
RESOLUTION TRUST CORPORATION,	)
Third-Party Defendant.	)

ORDER DENYING PLAINTIFF'S SECOND RENEWED MOTION TO REMAND

On February 9, 1993, and June 30, 1994, I denied plaintiff Kansas Public Employees Retirement Systems' (KPERS) Motions toRemand this case to the Shawnee County District Court in Topeka, Kansas. On September 12, 1995, KPERS filed a Second Renewed Motion

to Remand in which it seeks reconsideration of the remand issue and an order remanding this case to the state courts of Kansas. According to KPERS,

> [t]his case remains in federal court only because this [c]ourt determined, on February 9, 1993, and on June 30, 1994, to exercise its discretion to retain these purely state law claims under the protective wing of supplemental federal jurisdiction pursuant to 28 U.S.C. § 1367(c)(3). Over the last year, however, the posture of this case has been altered dramatically. Federal jurisdiction no longer affords the opportunity for expeditious resolution of this controversy. Instead, it will result in delay, deferral and a waste of judicial resources. Therefore, this [c]ourt should not remand this matter to state court.
>
> In the alternative, this [c]ourt should sever the claims against the former officers and directors of Home Savings Association (HSA) and remand all remaining claims to state court.

KPERS' Suggestions in Support (Doc. 676) at 1.

KPERS points primarily to 1) the potential intervention of Boatmen's Bank which would require me to recuse; and 2) the decision of the Eighth Circuit Court of Appeals in KPERS v. Reimer & Koger, 61 F.3d 608 (8th Cir. 1995) as reasons to remand this case that were not considered in the prior Motions to Remand. KPERS urges me to decline to exercise supplemental federal jurisdiction over the state law claims remaining in this case. "At this stage of the litigation, supplemental federal jurisdiction has become an impediment to an expeditious resolution of the case and should therefore be declined. "KPERS' Suggestions in Support (Doc. 676) at 4.

For the reasons stated in the companion opinion issued this same date, this Motion for reconsideration is not authorized by the Federal Rules of Civil Procedure. KPERS has not stated any newly discovered facts or law that would qualify the motion to be considered under Rule 60(b), Federal Rules of Civil Procedure. The decision of the Eighth Circuit Court of Appeals issued on July 27, 1995, is not a newly discovered fact. It may be an unpleasant development from KPERS' viewpoint, but it is not the kind of fact that would support a Rule 60(b) motion.

Since the Eighth Circuit Court of Appeals' decision on July 27, 1995, KPERS has taken a number of steps, including the filing of this motion, to delay the expedi-

tious resolution of this case. Contrary to KPERS' statements that federal jurisdiction has become an impediment to an expeditious resolution of this case, federal jurisdiction promises to bring this lengthy and complex litigation to an end in the foreseeable future. Dispositive motions filed by the defendants are being briefed at this time and will be considered and probably ruled by the end of this year. Ruling on these dispositive motions is an essential and important step in resolving this case at the trial level. Once the motions are ruled, all parties will know what claims, if any, remain for trial. The final preparations for trial can then be scheduled and a new trial date established.

However, even if KPERS had asserted a proper motion to remand, the motion would have been denied. KPERS mistakenly asserts that supplemental jurisdiction is the only basis for this court's jurisdiction over this case. In addition to the proper exercise of supplemental jurisdiction, this court has original jurisdiction over all of the claims asserted in this case. In KPERS v. Reimer & Koger, 61 F.3d 608, 610 (8th Cir. 1995), the court stated with regard to a case removed to federal court by the RTC under the Financial Institutions Reform, Recovery and Enforcement Act: "Under § 144la(l), any suit to which the RTC is a party is 'deemed to arise under the laws of the United States,' and the district courts therefore have original jurisdiction over

such suits. This grant of jurisdiction includes the entire suit, even though the RTC was only a third-party defendant."

Because § 1441(a) (1) provides federal jurisdiction over all the claims contained in this case, there is no need to inquire into supplemental jurisdiction when the federal claims are dismissed. See Spring Garden Associates. L.P. v. RTC, 26 F.3d 412, 417 (3d Cir. 1994); see also California v. Keating, 986 F.2d 346, 348-49 (9th Cir. 1993) (adding the RTC to a case "transforms the entire action into one that 'arises under' the laws of the United States.). Therefore, original jurisdiction exists over the claims remaining after the RTC was dismissed.

On the other hand, if supplemental jurisdiction is required, I continue to believe that the factors of economy, convenience, fairness and comity weigh unmistakably in favor of exercising supplemental jurisdiction over the state law claims. See 28 U.S.C. § 1367(e).

KPERS suggests that my rulings and the decisions of the Eighth Circuit Court of Appeals "have seriously interfered with the ability of the Kansas state government to enforce the KPERS Act." Until KPERS demonstrates that these decisions are wrong under federal or Kansas law, which it has been unsuccessful in doing so far, KPERS' argument makes no sense. Furthermore,

KPERS persists in misunderstanding my analysis of the fairness factor. My concern about fairness focuses on the appearances generated by the obvious benefit to any member of KPERS, including the Kansas judges, who could receive increased benefits if KPERS is successful in this case. Furthermore, as I stated at the July 30, 1994, hearing, the Shawnee County District judge's participation in KPERS' ex parte efforts to thwart the RTC's removal rights "creates a reasonable concern about the manner in which the parties to this case might be treated if [the case is] returned to . . . Shawnee County." Tr. 199. All of the parties in this case deserve a forum for the resolution of their dispute free of these influences.

KPERS' efforts to manipulate the forum for resolving the dispute over its investment in HSA continue. Although this court offers KPERS a forum for the prompt resolution of its claims against the defendants, KPERS recently filed new cases in the Kansas state court asserting the same claims that are pending here. As a result, certain defendants filed motions for injunctive relief against this wasteful, distracting and expensive duplication of efforts. Resolving these motions has caused all parties to devote time and money which could have better been devoted to the summary judgment phase of this case. KPERS' persistent efforts to seek what KPERS believes to be a more friendly forum can

and should be taken into account in deciding whether the balance of factors favors remand. See Carnegie-Mellon University v. Cahill, 108 S. Ct. 614, 622 (1982).

I am firmly persuaded that with the passage of 15 months since the June 30, 1994, ruling, judicial economy deserves greater weight in the balance. Many substantial questions have been resolved during this 15-month period. If this case is remanded to Kansas, KPERS will seek different rulings from the Kansas court on many of the same questions. The wasted resources and delays caused by KPERS repeatedly seeking different rulings on the same issues from the same or different courts must be discouraged.

KPERS also argues that should abstain from exercising federal jurisdiction. However, abstention is the exception, not the rule. Colorado River Water Conservation Dist. v. United States, 96 S. Ct. 1236, 1244 (1976). None of the exceptional circumstances authorizing abstention are present in this case. See Colorado River, 94 S. Ct. at 1244. Contrary to KPERS' argument, no complex state regulatory scheme or state effort to establish a coherent policy with respect to a matter of substantial public concern is involved here. KPERS seeks only to recover money damages on a number of straightforward theories.

For the reasons stated, it is ORDERED that KPERS' Second Renewed Motion to Remand is denied.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
October 25, 1995.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, Plaintiff, v. REIMER & KOGER ASSOCIATES, INC., et al., Defendants, FRANK MORGAN, et al., Defendants and Third-Party Plaintiffs, v. RESOLUTION TRUST CORPORATION, Third-Party Defendant.	No. 92-0922-CV-W-9
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM Plaintiff, v. BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C., et al., Defendants and Third-Party Plaintiffs,	No. 95-0819-CV-W-9

v.)
)
RESOLUTION TRUST)
CORPORATION,)
)
Third-Party Defendant.)

ORDER GRANTING DEFENDANTS' MOTION FOR FINAL JUDGMENT PURSUANT TO RULE 54 AND GRANTING DEFENDANTS' MOTION FOR PERMANENT INJUNCTION

On June 3, 1996, I issued an order granting summary judgment in favor of Reimer & Koger Associates, Inc. , Kenneth Koger, Ron Reimer, Clifford Shinski, Brent Messick, and Robert Crew (the Reimer & Koger defendants); I.I. Ozar, Sherman Dreiseszun, and the Estate of Frank Morgan (the HSA defendants) Frank Sebree; and Shook, Hardy & Bacon (Shook Hardy) because KPERS' claims asserted against those defendants are barred by the applicable Kansas statute of limitations.

After the June 3, 1996, order was issued, the HSA defendants moved for a final judgment under Rule 54(b), Federal Rules of Civil Procedure.

During a hearing on June 28, 1996, the Reimer & Koger defendants, Shook Hardy and Frank Sebree, joined in the HSA defendants' motion. KPERS' counsel stated that KPERS did not oppose the motion as long as all parties whose summary judgment motions were

decided in the June 3, 1996, order were included in the Rule 54(b) final judgment.

Rule 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

No just reason exists for delay in entering a final judgment pursuant to Rule 54 (b) , in favor of all the defendants in Case No. 92-0922 who prevailed in the June 3, 1996, order. Thus, defendants' Motion for a Final Judgment Under Rule 54(b) will be granted.

Also during the June 28, 1996, hearing, Shook Hardy's counsel requested that as part of the Rule 54(b) final judgment entered in this case the preliminary injunction entered on September 28, 1995, be made permanent. (The preliminary injunction prohibited KPERS from filing, in any other court, claims against the

defendants named in that order arising out of KPERS' investments in Home Savings.) Defendant Frank Sebree joined in the motion. KPERS requested an opportunity to file a written response to the oral motion.

On July 5, 1996, I issued an Order Directing KPERS to Show Cause Why Permanent Injunction Should Not Issue.

By letter dated July 16, 1996, KPERS responded to the Show Cause order. In its letter, KPERS states that it opposes the request that a permanent injunction be entered for all the reasons it objected to the entry of the preliminary injunction. In addition, KPERS asserts that Shook Hardy has not articulated any good cause for a permanent injunction.

After receiving an adverse ruling on the statute of limitations from the Eighth Circuit Court of Appeals, KPERS brought suit in Kansas against Blackwell Sanders Matheny Weary & Lombardi (Blackwell Sanders) and many of the defendants in Case No. 92-0922 asserting the same claims that had been pending for years in this court. Without the injunction I entered on September 28, 1995, I am persuaded that KPERS might again embark on a program of suing the defendants in Case No. 92-0922 and Blackwell Sanders in Kansas asserting the same claims asserted in those cases. For this reason, I restate as if fully set out in this order the findings of facts and

conclusions of law stated on the record at the September 28, 1995, hearing when I granted defendants' motion for preliminary injunctive relief. In order to protect the jurisdiction of this court and to protect the defendants from needless expense and repetitive litigation, defendants' motion that KPERS be permanently enjoined from bringing suit against them in any other court for claims arising out of KPERS' investment in Home Savings will be granted.

Accordingly, it is ORDERED that:

1) because there is no just reason for delay and for the reasons stated in the order dated June 3, 1996, judgment is entered in favor of I.I. Ozar, the Estate of Frank Morgan, Sherman Dreiseszun, Frank Sebree, Reimer & Koger Associates, Inc., Ron Reimer, Ken Koger, Clifford Shinski, Brent Messick, Robert Crew and Shook Hardy and Bacon and against plaintiff on all claims asserted against these defendants in plaintiff's Amended Complaint;

2) defendants' request that the September 28, 1995, preliminary injunction be made permanent is granted;

3) KPERS is permanently enjoined from filing in any other court, claims arising out of KPERS' investments in Home Savings against the following defendants: Shook Hardy and Bacon; Frank Sebree; KPMG Peat Marwick; Robert W. L. Spence; Reimer & Koger

Associates, Inc. ; Ronald Reimer; Kenneth Koger; Robert Crew; Clifford Shinski; Brent Messick; and Blackwell Sanders Matheny Weary & Lombardi; and

4) the $500 bond submitted to the Clerk of the Court by each defendant at the time the preliminary injunction was entered shall be applicable to the permanent injunction.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT COURT

Kansas City, Missouri
July 22, 1996.

No. 96-113

Supreme Court, U.S.
FILED
SEP 20 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KANSAS PUBLIC EMPLOYEES
RETIREMENT SYSTEM,
Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

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QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the entry of a now-expired preliminary injunction, under 28 U.S.C. § 1446(d), on the ground that the injunction was necessary to prevent Petitioner's attempt to subvert the removal jurisdiction of the District Court under 12 U.S.C. § 1441a(*l*).

LIST OF PARTIES AND RULE 29.6 STATEMENT

In addition to the parties listed by the petitioner, the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Shook, Hardy & Bacon has no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
1. Background	1
2. Procedural History	2
3. The District Court's Rulings	5
4. The Eighth Circuit's Decision	5
5. Subsequent District Court Proceedings	7
REASONS FOR DENYING THE WRIT	8
I. THE COURT OF APPEALS' REJECTION OF PETITIONER'S JURISDICTIONAL CHALLENGE TO THE PRELIMINARY INJUNCTION WAS BASED NOT ON 28 U.S.C. § 1367 BUT RATHER ON A CORRECT INTERPRETATION OF 12 U.S.C. § 1441a(*l*)	8
II. THERE IS NO CIRCUIT SPLIT CONCERNING 28 U.S.C. § 1367	8
III. CONTRARY TO PETITIONER'S ASSERTION, THE COURT CONSIDERED THE *YOUNGER* ABSTENTION DOCTRINE AND CORRECTLY HELD THAT IT DID NOT REQUIRE REMAND	10
IV. THERE IS NO CIRCUIT SPLIT CONCERNING THE DISTRICT COURT'S POWER UNDER 28 U.S.C. § 1446(d)	11

TABLE OF CONTENTS—Continued

Page

V. PETITIONER SEEKS INTERLOCUTORY REVIEW OF A NOW-EXPIRED PRELIMINARY INJUNCTION, AND THE ISSUES IT SEEKS TO RAISE WOULD BE BEST PRESENTED ON CERTIORARI FROM APPEAL OF THE FINAL JUDGMENT 12

CONCLUSION 14

APPENDICES

APPENDIX A

Order of final judgment and Memorandum Order granting final judgment and permanent injunction, United States District Court for the Western District of Missouri, dated July 22, 1996 ..... 1a

APPENDIX B

"Form A" filed in United States Court of Appeals for the Eighth Circuit in *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc., et al.*, No. 96-3317WMKC, dated August 19, 1996 ..... 7a

APPENDIX C

Notice of Appeal from final judgment entered by United States District Court for the Western District of Misscuri, dated August 20, 1996 ..... 8a

TABLE OF AUTHORITIES

CASES — Page

Brown v. Seaboard C.L. R.R. Co., 309 F. Supp. 48 (N.D. Ga. 1969) 11
Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) 6
Doe v. District of Columbia, No. 95-7077, 1996 WL 480414 (D.C. Cir. Aug. 27, 1996) 10
Estelle v. Gamble, 429 U.S. 97 (1976) 12
Executive Software N. Am., Inc. v. United States Dist. Ct., 24 F.3d 1545 (9th Cir. 1994) 10
FSLIC v. Griffin, 935 F.2d 691 (5th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992) 8
Faulkner v. Jones, 116 S. Ct. 331 (1995) 13
Fischman v. Fischman, 470 F. Supp. 980 (E.D. Pa. 1979) 11
Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899 (5th Cir. 1975) 11
KPERS v. Reimer & Koger Assocs., Inc., 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994) 3
KPERS v. Reimer & Koger Assocs., Inc., 60 F.3d 1304 (8th Cir. 1995) 2
KPERS v. Reimer & Koger Assocs., Inc., 61 F.3d 608 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 915 (1996) 4
KPERS v. Reimer & Koger Assocs., Inc., 77 F.3d 1063 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3085 ..... *passim*
LaShawn A. v. Barry, 87 F.3d 1389 (D.C. Cir. 1996) 9
Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) 11
Madison Square Garden Boxing, Inc. v. Shavers, 562 F.2d 141 (2d Cir. 1977) 13
Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) 9
Moore v. Ogilvie, 394 U.S. 814 (1969) 13
Myers v. County of Lake, 30 F.3d 847 (7th Cir.), *cert. denied*, 115 S. Ct. 666 (1994) 10

TABLE OF AUTHORITIES—Continued

	Page
Myers v. Hertz Penske Truck Leasing, Inc., 572 F. Supp. 500 (N.D. Ga. 1983)	11
PAS v. Travelers Ins. Co., 7 F.3d 349 (3d Cir. 1993)	10
Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1305 (1977)	13
Pacificare, Inc. v. Burrage, 59 F.3d 151 (10th Cir. 1995)	10
Palmer v. Hospital Auth., 22 F.3d 1559 (11th Cir. 1994)	10
Reliable Transfer Co. v. Gallahar, 54 F. Supp. 395 (S.D. Ga.), *aff'd*, 145 F.2d 551 (5th Cir. 1944)	12
Thomas v. LTV Corp., 39 F.3d 611 (5th Cir. 1994)	10
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	6, 9
United States v. Johnston, 268 U.S. 220 (1925)	12
Younger v. Harris, 401 U.S. 37 (1971)	6, 11
STATUTES	
H.R. Rep. No. 101-734, *reprinted in* 1990 U.S.C.C.A.N. 6802	9
12 U.S.C. § 1441a(*l*)	*passim*
12 U.S.C. § 1441a(m)	8
28 U.S.C. § 1367	5, 6, 8, 9, 10
28 U.S.C. § 1446(d)	7, 11
TREATISES	
Robert L. Stern *et al.*, *Supreme Court Practice* (7th ed. 1993)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-113

KANSAS PUBLIC EMPLOYEES
RETIREMENT SYSTEM,
Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

STATEMENT OF THE CASE

1. Background

Petitioner Kansas Public Employees Retirement System ("KPERS") seeks review of a decision of the Court of Appeals for the Eighth Circuit affirming a preliminary injunction barring KPERS, which had two identical suits pending in the District Court against respondent Shook, Hardy & Bacon ("Shook Hardy") on claims arising from KPERS' investments in Home Savings Association, F.A. ("Home Savings"), from filing more suits against the law firm on the same claims. The District Court granted the injunction based, *inter alia*, on the undisputed finding that the reason for KPERS' filing of additional suits was to

circumvent an Eighth Circuit ruling on the applicable statute of limitations. Pet. App. at 18a, 22a, 28a, 31a.[1]

The preliminary injunction has expired because the District Court entered a final judgment, including a permanent injunction, in favor of the defendants on July 22, 1996. Opp. App. at 1a-6a. KPERS has noticed an appeal from the judgment, including the permanent injunction, to the Eighth Circuit. Opp. App. at 7a-9a.

2. Procedural History

In this case, KPERS sued the former directors of Home Savings and a number of professional firms for losses arising from investments KPERS made in Home Savings in 1986. *See* Pltf. App. at 98 (Docket entry 537). The suit was initially filed in Kansas state court in 1991 naming the directors of Home Savings (hereinafter "the Home Savings defendants"), KPERS' outside investment advisor, and certain other parties as defendants. Pltf App. at 6 (Docket entry, 6/5/91). The claims asserted by KPERS are "conventional" common law or statutory tort and contract claims seeking money damages only. *See KPERS v. Reimer & Koger Assocs., Inc. (KPERS II)*, 60 F.3d 1304, 1306 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc. (KPERS IV)*, 77 F.3d 1063, 1071 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3085 (U.S. July 17, 1996) (No. 96-113), Pet. App. at 13a; Pltf. App. at 98 (Docket entry 537, Sixth Amended Complaint). KPERS' claims against Shook Hardy are for negligent misrepresentation, breach of fiduciary duty,

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[1] As used in this brief, "Pet. App." refers to KPERS' appendix to its Petition for Writ of Certiorari; "Opp. App." refers to the appendix to Shook Hardy's Opposition to KPERS' Petition; "Pltf. App." refers to the appendix to KPERS' brief in the Eighth Circuit; and "Def. App." refers to the appendix to Shook Hardy's brief in the Eighth Circuit.

and participation in breach of fiduciary duty. Pltf. App. at 98 (Sixth Amended Complaint).[2]

On March 17, 1992, the Home Savings defendants filed a motion to dismiss KPERS' claims in lieu of answering KPERS' complaint. Pltf. App. at 22 (Docket entries, 3/17/92). On May 13, 1992, the Resolution Trust Corporation ("RTC") as successor-in-interest to Home Savings moved to intervene in the case. Pltf. App. at 26 (Docket entry, 5/13/92). While the RTC's motion to intervene was pending, the state court denied the Home Savings defendants' motion to dismiss KPERS' petition. Pltf. App. at 28 (Docket entry, 8/21/92). The Home Savings defendants then filed an answer which included a third-party petition naming the RTC a third-party defendant in the case. Pltf. App. at 30 (Docket entries, 10/2/92).

On October 13, 1992, the RTC removed KPERS' lawsuit to federal court in Kansas City, Missouri, the location of Home Savings, pursuant to 12 U.S.C. § 1441a(*l*)(3)(A), the RTC removal provision. Pltf. App. at 47 (Docket entry 1). Once the case was removed, KPERS sought remand of its claims to state court. Pltf. App. at 47 (Docket entry 7). The District Court denied remand, and that decision was affirmed by the Eighth Circuit. *KPERS v. Reimer & Koger Assocs., Inc. (KPERS I)*, 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994). The RTC was subsequently dismissed as a third-party defendant, Pltf. App. at 565-68, and the District Court again declined to remand the case to Kansas state court. Pltf. App. at 760-71, 769-70. KPERS did not seek interlocutory review of that decision. Pet. App. at 5a.

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[2] In an attempt to fit within doctrines of abstention articulated by this Court, KPERS mischaracterizes its lawsuit as one involving "civil fraud claims . . . pursued in lieu of a criminal prosecution." Pet. at 3, 4, 14. In fact, KPERS has never alleged fraud or any other intentional wrongdoing by Shook Hardy that would support a criminal prosecution.

The case proceeded through the completion of fact discovery, and a trial date was set for January 1996. Pltf. App. at 80 (Docket entry 353). On July 27, 1995, the Eighth Circuit reversed a ruling by the District Court on the statute of limitations applicable to KPERS' claims. *KPERS v. Reimer & Koger Assocs.*, 61 F.3d 608 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 915 (1996). The effect of this ruling was to subject KPERS' claims to the general two- and three-year Kansas statutes of limitation for tort and statutory claims. In the wake of this decision, KPERS began what the District Court subsequently found to be a campaign to delay the progress of this case by, among other means, filing repetitive state court lawsuits against the same defendants on the same claims that had been pending in the District Court since 1992. Def. App. at 40; Pet. App. at 27a-29a; Pltf. App. at 788, 865, 895.

KPERS' new lawsuits against Shook Hardy and certain of the other defendants were filed in the District Court of Shawnee County, Kansas, on August 23, 1995. *See* Pltf. App. at 788, 865, 895. KPERS' counsel publicly admitted that the new lawsuits were prompted by what KPERS regarded as an "erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations." Def. App. at 09-10; Pet. App. at 4a-5a. The District Court later found that KPERS' new claims were "substantially the same, if not identical" to the claims in the initial action, Pet. App. at 22a, 5a, and that KPERS' repeated filing of duplicative lawsuits was intended to "undercut" the purpose of the RTC removal statute, 12 U.S.C. § 1441a (*l*)(1). Pet. App. at 18a-19a, 29a-30a.

Shook Hardy answered the new state court petition and filed a third-party claim for indemnity against the RTC. Pltf. App. at 1064-92; Pet. App. at 4a. The RTC then elected to remove the new lawsuit to the United States District Court for the Western District of Missouri on September 12, 1995. Pltf. App. at 1378-83; Pet. App. at 4a. That new lawsuit remains pending in the District Court.

3. The District Court's Rulings

On September 13, 1995, Shook Hardy moved for a temporary restraining order and, together with certain other parties, for a preliminary injunction barring KPERS from filing *additional* state court lawsuits against it arising out of the Home Savings investment. Pltf. App. at 1461-526; Pet. App. at 4a. The District Court granted Shook Hardy's motion for a temporary restraining order on September 14, 1995, after KPERS refused to agree that it would not file new state court actions against Shook Hardy in the period before the preliminary injunction motions could be heard. Def. App. at 13-16, 23-28; Pltf. App. at 1783-86. Following a hearing on September 28, 1995, the District Court entered a preliminary injunction prohibiting KPERS from pursuing separate state court actions against Shook Hardy and the other moving defendants. Pet. App. at 21a-32a.

The District Court rejected an attack by KPERS on the federal court's jurisdiction over the case following dismissal of the third party claims against the RTC, holding that (i) the District Court had "arising under" jurisdiction over the entire case under 12 U.S.C. § 1441a, and (ii) in any event, it was appropriate to continue to exercise supplemental jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367(c). Def. App. at 38-43.

4. The Eighth Circuit's Decision

On appeal, KPERS devoted little attention to the propriety of the preliminary injunction, occupying itself primarily with its attack on the District Court's exercise of supplemental jurisdiction, which KPERS argued was contrary to federal abstention principles and an abuse of discretion under the supplemental jurisdiction statute, 28 U.S.C. § 1367. Pet. App. at 5a.

The Eighth Circuit found KPERS' arguments assailing the District Court's supplemental jurisdiction to be mis-

placed because they ignored the District Court's alternative ruling that it had jurisdiction over KPERS' claims based on the RTC's removal under 12 U.S.C. § 1441a (*l*)(1). Pet. App. at 5a-6a. The Eighth Circuit affirmed this holding, which was dispositive of KPERS' jurisdictional arguments. *Id.* The court nevertheless proceeded to address KPERS' arguments concerning supplemental jurisdiction and abstention. *Id.* at 6a-14a.

Thus, in an alternative holding, the Eighth Circuit stated that it did not need to decide whether the District Court abused its discretion under § 1367(c) by retaining jurisdiction over KPERS' claims after the RTC was dismissed in order to determine if the District Court possessed jurisdiction to issue the injunction. Pet. App. at 6a-7a. Applying this Court's decisions in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), the court held that the District Court obtained supplemental jurisdiction over KPERS' claims when the RTC removed them to federal court, and it retained supplemental jurisdiction even after the RTC was dismissed as a party. Pet. App. at 6a-7a. Whether the District Court abused its discretion by keeping the case after the RTC was no longer a party could not affect the underlying *jurisdiction* of the District Court, which was determined at the time of removal. *Id.*

The Eighth Circuit found no merit to KPERS' argument that the District Court was required to abstain from hearing KPERS' claims under the principles of *Younger v. Harris*, 401 U.S. 37 (1971). The court held that because the District Court had exclusive jurisdiction over KPERS' claims pursuant to 12 U.S.C. § 1441a(*l*), it would have been inappropriate for it to abstain from hearing those claims.

KPERS also argued on appeal that the District Court lacked authority to issue the injunction. The Eighth Cir-

cuit rejected this argument and affirmed the authority of the District Court to issue the injunction under 28 U.S.C. § 1446(d) and the RTC removal provision, 12 U.S.C. § 1441a(*l*). Pet. App. at 7a-14a & n.6. Specifically, the court found that district courts are empowered under these provisions to enjoin duplicative state proceedings that are filed to subvert the purposes of the removal statute, which is what the District Court found KPERS had already attempted to do and would attempt again absent an injunction. *Id.* The court held that the RTC removal statute was intended "to provide a federal forum for the entirety of any case to which the RTC is a party at the time of removal. To permit KPERS to circumvent this goal by prosecuting a competing suit in state court would therefore subvert the purpose of the RTC removal statute." *Id.* at 12a.

5. Subsequent District Court Proceedings

Since the Eighth Circuit affirmed the District Court's issuance of the preliminary injunction, the District Court has dismissed KPERS' claims against all of the defendants as barred by the applicable statutes of limitations and entered a final judgment for the defendants in the case. *See* Opp. App. at 1a-2a (Order of June 3, 1996 and Order of Final Judgment of July 22, 1996, filed in *KPERS v. Reimer & Koger Assocs., Inc. et al.*, No. 92-0922-CV-W-9 (W.D. Mo.)). As part of the final judgment, the District Court also granted the defendants' request for a permanent injunction superseding the preliminary injunction in effect during the pendency of the District Court proceedings. Opp. App. at 1a-6a. KPERS has taken an appeal from the final judgment and has raised the propriety of the permanent injunction as an issue on appeal. Opp. App. at 7a-9a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' REJECTION OF PETITIONER'S JURISDICTIONAL CHALLENGE TO THE PRELIMINARY INJUNCTION WAS BASED NOT ON 28 U.S.C. § 1367 BUT RATHER ON A CORRECT INTERPRETATION OF 12 U.S.C. § 1441a(*l*).

Petitioner's primary challenge to the preliminary injunction was an argument that the District Court lacked jurisdiction over the case under 28 U.S.C. § 1367(c) after the third-party complaint against the RTC was dismissed. Despite Petitioner's extraordinary attempt to disguise it, the primary basis of the Court of Appeals' holding that the District Court continued to have jurisdiction after the RTC's dismissal was not 28 U.S.C. § 1367, but 12 U.S.C. § 1441a(*l*). The Court of Appeals held that under § 1441a(*l*), "the federal court has arising-under, rather than supplemental, jurisdiction even over the claims that do not involve the RTC." Pet. App. at 6a.

Section 1441a(*l*) was a statute that dealt specifically and exclusively with cases involving the RTC. The RTC, however, went out of existence on December 31, 1995, 12 U.S.C. § 1441a(m), and its removal statute effectively became a nullity at that time. Thus, even if the Court of Appeals' reliance on § 1441a(*l*) were questionable, there would be nothing to gain from Supreme Court review of that issue.[3]

II. THERE IS NO CIRCUIT SPLIT CONCERNING 28 U.S.C. § 1367.

Even assuming that 28 U.S.C. § 1367 governed the issue, the Court of Appeals' holding that the District Court's jurisdiction survived the RTC's dismissal was correct, and there is no split of authority on that issue.

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[3] In any event, the Court of Appeals' reliance on § 1441a(*l*) was correct. *See, e.g., FSLIC v. Griffin*, 935 F.2d 691, 695-96 (5th Cir. 1991) (holding, under similar FDIC removal statute, that "federal question jurisdiction exist[ed]" even after the dismissal of the FDIC), *cert. denied*, 502 U.S. 1092 (1992).

Petitioner attempts to create a circuit split based on two cases, *Maguire v. Marquette Univ.*, 814 F.2d 1213 (7th Cir. 1987), and *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996) (en banc). Petitioner asserts that these cases conflict with the Eighth Circuit's holding that it had no obligation to consider whether the District Court's retention of jurisdiction was an abuse of discretion under 28 U.S.C. § 1367(c) because the District Court had the power to hear the case—i.e., jurisdiction—even if it abused its discretion in exercising that power.[4]

Neither *Maguire* nor *Barry* was decided under § 1367, however. Both preceded the effective date of that provision and were decided under pre-existing decisional law. To any extent that these cases supported Petitioner's theory,[5] they have been superseded by the clear language of § 1367(c), which provides that a "district court *may* decline to exercise supplemental jurisdiction over a claim" if certain circumstances exist, including situations where the district court has dismissed all claims over which it had original jurisdiction. *See* 28 U.S.C. § 1367(c)(3) (emphasis added). Of course, if the issue were jurisdictional, Congress would have *required* a district court to dismiss or remand where the conditions specified in § 1367(c) are present. That it did not do so shows beyond doubt that the discretionary element of supplemental jurisdiction is *not* jurisdictional.[6]

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[4] If the issue was not jurisdictional, it was not properly before the Court of Appeals. Petitioner did not appeal from the District Court's decision not to remand the case following the RTC's dismissal. Pet. App. at 5a.

[5] It would be difficult to imagine a case that more squarely rejects Petitioner's theory than does *Barry*. The *Barry* court held that "the second step of the *Gibbs* analysis," namely, the issue (now codified in § 1367(c)) of whether a district court should exercise its discretion to hear pendent claims, *"is not a jurisdictional determination."* 87 F.3d at 1396 (emphasis supplied).

[6] The legislative history confirms this. *See* H.R. Rep. No. 101-734, *reprinted in* 1990 U.S.C.C.A.N. 6802, 6875 (Section 1367(c)

Petitioner has identified no case that has interpreted § 1367 any differently than did the Eighth Circuit. There is, therefore, no circuit split. In fact, the courts of appeals have frequently confronted the issue and uniformly agree with the Eighth Circuit that § 1367(c) is not jurisdictional. *See Doe v. District of Columbia*, No. 95-7077, 1996 WL 480414 (D.C. Cir. Aug. 27, 1996); *Myers v. County of Lake*, 30 F.3d 847, 849-50 (7th Cir.), *cert. denied*, 115 S. Ct. 666 (1994);[7] *Pacificare, Inc. v. Burrage*, 59 F.3d 151, 152-53 (10th Cir. 1995); *Thomas v. LTV Corp.*, 39 F.3d 611, 615 (5th Cir. 1994); *Executive Software N. Am., Inc. v. United States Dist. Ct.*, 24 F.3d 1545, 1549 (9th Cir. 1994); *Palmer v. Hospital Auth.*, 22 F.3d 1559 (11th Cir. 1994); *PAS v. Travelers Ins. Co.*, 7 F.3d 349, 352 (3d Cir. 1993).

In sum, there is no controversy concerning § 1367 that requires resolution by this Court.

III. CONTRARY TO PETITIONER'S ASSERTION, THE COURT CONSIDERED THE *YOUNGER* ABSTENTION DOCTRINE AND CORRECTLY HELD THAT IT DID NOT REQUIRE REMAND.

As part of its jurisdictional challenge to the preliminary injunction, Petitioner argued that the District Court was required to abstain from exercising federal jurisdiction and

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"codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim, *even though it is empowered to hear the claim.*" (emphasis supplied)).

[7] *Myers* precludes any possible argument that *Maguire* is still good law in the Seventh Circuit. *Maguire* characterized as jurisdictional what it called the Gibbs "rule" that pendent claims should be dismissed or remanded when the federal claims are dismissed prior to trial. In *Myers*, the federal claims were dismissed prior to trial, yet the Court of Appeals held that there was no lack of subject-matter jurisdiction. Likewise, *Doe* eliminates any possible argument that the District of Columbia Circuit would adhere to *Maguire*. In *Doe*, too, the federal claims were dismissed, but the Court of Appeals held that jurisdiction remained.

instead to remand the case to state court, citing *Younger v. Harris*, 401 U.S. 37 (1971). Contrary to Petitioner's representations, the Court of Appeals did not treat the *Younger* abstention doctrine as "simply irrelevant." To the contrary, the Court of Appeals considered *Younger* abstention and held that it did not require remand. Pet. App. at 13a-14a. That holding was correct.

First, Petitioner's contention that *Younger* was applicable because "the respondents' alleged fraud" (Pet. at 14) could have been criminally prosecuted is entirely wrong. Respondent Shook Hardy was not alleged to have committed any fraud; the claims against it were limited to allegations of negligence. Second, as the Eighth Circuit correctly held, Pet. App. at 13a-14a, *Younger* abstention is not applicable in cases of exclusive federal jurisdiction. Here, the District Court had exclusive jurisdiction under 12 U.S.C. § 1441a(*l*).

IV. THERE IS NO CIRCUIT SPLIT CONCERNING THE DISTRICT COURT'S POWER UNDER 28 U.S.C. § 1446(d).

The Court of Appeals was correct in holding that the preliminary injunction was authorized under 28 U.S.C. § 1446(d), and there is no split of authority on that issue.

The Eighth Circuit's holding was entirely consistent with *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988), and *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899 (5th Cir. 1975). These cases stand for the proposition that 28 U.S.C. § 1446(d) authorizes a District Court presiding over a removed case to enjoin parallel suits "filed in state court i[n] an attempt to subvert the purposes of the removal statute." *Frith*, 512 F.2d at 901. *Accord Myers v. Hertz Penske Truck Leasing, Inc.*, 572 F. Supp. 500 (N.D. Ga. 1983); *Fischman v. Fischman*, 470 F. Supp. 980 (E.D. Pa. 1979); *Brown v. Seaboard C.L. R.R. Co.*,

309 F. Supp. 48 (N.D. Ga. 1969); *Reliable Transfer Co. v. Gallaher,* 54 F. Supp. 395 (S.D. Ga.), *aff'd,* 145 F.2d 551 (5th Cir. 1944).

The unique factual circumstances of this case leave no doubt as to the proper application of this standard here. Petitioner went out of its way to state, both to the District Court and in the press, that its purpose for filing duplicative state lawsuits was to seek a more favorable ruling from the Kansas courts on an issue already ruled upon by the federal courts. This candid admission was highly unusual and egregious evidence that, as the District Court found, Petitioner's intent in filing its post-removal state-court action was to subvert the court's removal jurisdiction. This finding of fact is beyond challenge and, in any event, is not a proper subject of Supreme Court review. *See United States v. Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.")

V. PETITIONER SEEKS INTERLOCUTORY REVIEW OF A NOW-EXPIRED PRELIMINARY INJUNCTION, AND THE ISSUES IT SEEKS TO RAISE WOULD BE BEST PRESENTED ON CERTIORARI FROM APPEAL OF THE FINAL JUDGMENT.

The decision of the District Court to enter a preliminary injunction, and the Court of Appeals' affirmance, were interlocutory actions. The case continued in the District Court, which entered a final judgment, including a permanent injunction, on July 22, 1996. Under the circumstances present here, there is every reason for this Court to adhere to its "normal practice of denying interlocutory review." *Estelle v. Gamble,* 429 U.S. 97, 114 (1976) (Stevens, J., dissenting).

First, the Petition is a futile gesture because the preliminary injunction from which KPERS appealed is no longer in force. That preliminary injunction ceased to exist when the District Court entered final judgment, in-

cluding a permanent injunction, on July 22, 1996, five days after this Petition was filed. *See Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 144 (2d Cir. 1977) ("[w]ith the entry of the final judgment, the life of the preliminary injunction came to an end"). Because all of Petitioner's arguments were raised as challenges to the preliminary injunction, all are now irrelevant.[8]

Second, the issues Petitioner seeks to raise can be—and should be—raised on certiorari from the appeal of the final judgment in this case. This Court has a strong policy in favor of granting review "only after a full record is compiled in . . . the District Court followed by statutory appeal to the Courts of Appeals." *Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1309 (1977) (Rehnquist, J., in chambers). Petitioner has noticed an appeal to the Eighth Circuit from the District Court's final judgment, which includes all aspects of this complex litigation, including the conversion of the preliminary injunction into a permanent injunction. Opp. App. at 7a-9a. If Supreme Court review of Petitioner's arguments is ever appropriate, it will be on certiorari from the Eighth Circuit's eventual ruling in that appeal.

There is, moreover, no question of the issues evading review, *see Moore v. Ogilvie*, 394 U.S. 814 (1969), if the instant Petition is denied. Whether the District Court had the power to enjoin parallel state-court proceedings, and the jurisdictional issues Petitioner raised in challenging the injunction, are issues merged into the final judgment, and they will be open to review by this Court, if appropriate, after resolution of the pending appeal.

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[8] Because the Petition would not be worthy of certiorari in any event, the proper disposition is denial of certiorari, *see* Robert L. Stern et al., *Supreme Court Practice* § 18.5, at 724 (7th ed. 1993), or dismissal of the Petition, *see Faulkner v. Jones*, 116 S. Ct. 331 (1995).

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be denied.

Respectfully submitted,

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September 20, 1996

* Counsel of Record

APPENDIX A

[Filed, July 22, 1996]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Case Number: 92-0922-CV-W-9
95-0819-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Defendant.

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

1) because there is no just reason for delay and for the reasons stated in the order dated June 3, 1996, judgment is entered in favor of I.I. Ozar, the Estate of Frank Morgan, Sherman Dreiseszun, Frank Sebree, Reimer & Koger Associates, Inc., Ron Reimer, Ken Koger, Clifford Shinski, Brent Messick, Robert Crew and Shook Hardy and Bacon and against plaintiff on all claims asserted against these defendants in plaintiff's Amended Complaint;

2) defendants' request that the September 28, 1995, preliminary injunction be made permanent is granted;

3) KPERS is permanently enjoined from filing in any other court, claims arising out of KPERS' investments in Home Savings against the following defendants: Shook Hardy and Bacon; Frank Sebree; KPMG Peat Marwick; Robert W. L. Spence; Reimer & Koger Associates, Inc.; Ronald Reimer; Kenneth Koger; Robert Crew; Clifford Shinski; Brent Messick; and Blackwell Sanders Matheny Weary & Lombardi; and

4) the $500 bond submitted to the Clerk of the Court by each defendant at the time the preliminary injunction was entered shall be applicable to the permanent injunction.

Date July 22, 1996

R. F. CONNOR
Clerk

/s/
(By) Deputy Clerk

[Filed, July 22, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 92-0922-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Defendants,

FRANK MORGAN, *et al.*,
Defendants and
Third-Party Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,
Third-Party Defendant.

No. 95-0819-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

BLACKWELL SANDERS MATHENY WEARY &
LOMBARDI, L.C., *et al.*,
Defendants and
Third-Party Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,
Third-Party Defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR FINAL JUDGMENT PURSUANT TO RULE 54 AND GRANTING DEFENDANTS' MOTION FOR PERMANENT INJUNCTION

On June 3, 1996, I issued an order granting summary judgment in favor of Reimer & Koger Associates, Inc., Kenneth Koger, Ron Reimer, Clifford Shinski, Brent Messick, and Robert Crew (the Reimer & Koger defendants); I.I. Ozar, Sherman Dreiseszun, and the Estate of Frank Morgan (the HSA defendants); Frank Sebree; and Shook, Hardy & Bacon (Shook Hardy) because KPERS' claims asserted against those defendants are barred by the applicable Kansas statute of limitations.

After the June 3, 1996, order was issued, the HSA defendants moved for a final judgment under Rule 54(b), Federal Rules of Civil Procedure.

During a hearing on June 28, 1996, the Reimer & Koger defendants, Shook Hardy and Frank Sebree, joined in the HSA defendants' motion. KPERS' counsel stated that KPERS did not oppose the motion as long as all parties whose summary judgment motions were decided in the June 3, 1996, order were included in the Rule 54(b) final judgment.

Rule 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

No just reason exists for delay in entering a final judgment pursuant to Rule 54(b), in favor of all the defendants in Case No. 92-0922 who prevailed in the June 3,

1996, order. Thus, defendants' Motion for a Final Judgment Under Rule 54(b) will be granted.

Also during the June 28, 1996, hearing, Shook Hardy's counsel requested that as part of the Rule 54(b) final judgment entered in this case the preliminary injunction entered on September 28, 1995, be made permanent. (The preliminary injunction prohibited KPERS from filing, in any other court, claims against the defendants named in that order arising out of KPERS' investments in Home Savings.) Defendant Frank Sebree joined in the motion. KPERS requested an opportunity to file a written response to the oral motion.

On July 5, 1996, I issued an Order Directing KPERS to Show Cause Why Permanent Injunction Should Not Issue.

By letter dated July 16, 1996, KPERS responded to the Show Cause order. In its letter, KPERS states that it opposes the request that a permanent injunction be entered for all the reasons it objected to the entry of the preliminary injunction. In addition, KPERS asserts that Shook Hardy has not articulated any good cause for a permanent injunction.

After receiving an adverse ruling on the statute of limitations from the Eighth Circuit Court of Appeals, KPERS brought suit in Kansas against Blackwell Sanders Matheny Weary & Lombardi (Blackwell Sanders) and many of the defendants in Case No. 92-0922 asserting the same claims that had been pending for years in this court. Without the injunction I entered on September 28, 1995, I am persuaded that KPERS might again embark on a program of suing the defendants in Case No. 92-0922 and Blackwell Sanders in Kansas asserting the same claims asserted in those cases. For this reason, I restate as if fully set out in this order the findings of facts and conclusions of law stated on the record at the September 28, 1995, hearing when I granted defendants' motion for preliminary injunctive relief. In order to protect the jurisdiction of this

court and to protect the defendants from needless expense and repetitive litigation, defendants' motion that KPERS be permanently enjoined from bringing suit against them in any other court for claims arising out of KPERS' investment in Home Savings will be granted.

Accordingly, it is ORDERED that:

1) because there is no just reason for delay and for the reasons stated in the order dated June 3, 1996, judgment is entered in favor of I.I. Ozar, the Estate of Frank Morgan, Sherman Dreiseszun, Frank Sebree, Reimer & Koger Associates, Inc., Ron Reimer, Ken Koger, Clifford Shinski, Brent Messick, Robert Crew and Shook Hardy and Bacon and against plaintiff on all claims asserted against these defendants in plaintiff's Amended Complaint;

2) defendants' request that the September 28, 1995, preliminary injunction be made permanent is granted;

3) KPERS is permanently enjoined from filing in any other court, claims arising out of KPERS' investments in Home Savings against the following defendants: Shook Hardy and Bacon; Frank Sebree; KPMG Peat Marwick; Robert W. L. Spence; Reimer & Koger Associates, Inc.; Ronald Reimer; Kenneth Koger; Robert Crew; Clifford Shinski; Brent Messick; and Blackwell Sanders Matheny Weary & Lombardi; and

4) the $500 bond submitted to the Clerk of the Court by each defendant at the time the preliminary injunction was entered shall be applicable to the permanent injunction.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
United States District Court

Kansas City, Missouri
July 22, 1996.

APPENDIX B

[Excerpt from Appellant's Form A]

U.S. COURT OF APPEALS
EIGHTH CIRCUIT

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff-Appellant

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Defendants-Appellees

---

* * * *

DATE OF DISTRICT COURT JUDGMENT: July 22, 1996

* * * *

DOES THIS CONSTITUTE YOUR STATEMENT OF ISSUES UNDER FRAP 10(b)(3)? (X) Yes. ( ) No.

I. Whether the district court erred in granting defendants summary judgment on the grounds that plaintiff's claims against them are barred by the 2- and 3-year Kansas statutes of limitations?

II. Whether the district court improperly permanently enjoined KPERS from filing in any other court claims against defendants arising out of KPERS' investments in Home Savings?

APPENDIX C

[Filed, August 20, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Civil Action No. 92-0922-CV-W-9, 95-0819-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Kansas Public Employees Retirement System (KPERS), plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit the Judgment entered in favor of defendants I.I. Ozar, the Estate of Frank Morgan, Sherman Dreiseszun, Frank Sebree, Reimer & Koger Associates, Inc., Ron Reimer, Ken Koger, Clifford Shinski, Brent Messick, Robert Crew and Shook Hardy and Bacon and against plaintiff on all claims asserted against these defendants in plaintiff's Amended Complaint and permanently enjoining KPERS from filing in any other court, claims arising out of KPERS' investments in Home Savings against those defendants and KPMG Peat Marwick; Robert W. L. Spence; and Blackwell Sanders Matheny Weary & Lombardi, entered in this action on the twenty-second day of July, 1996.

Respectfully submitted,

/s/ _____
One of Plaintiff's Attorneys

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No. 96-113

In The

Supreme Court of the United States

October Term, 1995

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondent respectfully suggests that the issues framed by petitioner are more accurately stated as follows:

1. Whether a federal district court may use 28 U.S.C. § 1446(d), which provides that a state court "shall proceed no further" once a case is removed, to enjoin parties from filing threatened state court cases that are admittedly designed to relitigate issues that the federal court has already decided?

2. Whether the trial court abused its discretion by exercising 28 U.S.C. § 1367 supplemental jurisdiction over state-law claims when the court considered and discussed abstention principles but determined that abstention would be inappropriate?

PARTIES TO THE PROCEEDING

The named respondents to this case are: Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth H. Koger, Clifford W. Shinski, Brent Messick, Robert Crew, Sherman Dreiseszun, Leland Gerhart, I.I. Ozar, Raymond Gifford, Harry S. Jonas, Randall M. Nay, Frank Sebree, Tony Salazar, Philip Pistilli, Michael K. Russell, Gage & Tucker, Peat, Marwick, Mitchell & Co., KPMG Peat Marwick, Robert Spence, Thomas S. Morgan, co-executor of the estate of Frank S. Morgan, Marilyn J, co-executor of the estate of Frank S. Morgan, Isabel A. Kiene, executrix of the estate of Ralph Kiene, Shook, Hardy & Bacon, C. Patrick McLarney, substituted for Shook Hardy law firm, Blackwell Sanders Matheny Weary & Lombardi, L.C.

RULE 29.1 STATEMENT

Respondent Blackwell Sanders Matheny Weary & Lombardi, L.C. is a Kansas City, Missouri-based law firm, with other offices outside of Missouri, operating as a limited liability company under the laws of the State of Missouri. Its member attorneys possess complete ownership of the firm, and the firm possesses no other ownership interests.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS FOR DENYING WRIT 2

I. The Federal District Court Properly Exercised Subject Matter Jurisdiction Over This Case, Both On The Ground Now Challenged By Petitioner, And On An Independent Ground On Which Petitioner Does Not Seek Review 3

II. The Court Should Not Issue An Advisory Opinion On How To Apply Principles Of Abstention And Comity To The Particular Facts Of This Case 7

III. Petitioner's Alleged Conflict Between The Circuits Is Nonexistent 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

In re Agent Orange Product Liability Litig., 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) 8

Brown v. Seaboard Coast L.R.R., 309 F. Supp. 48 (N.D. Ga. 1969) 9

In re Burns & Wilcox Ltd., 54 F.3d 475 (8th Cir. 1995) 8

Bushman v. Seiler, 755 F.2d 653 (8th Cir. 1985) 4

California v. Keating, 986 F.2d 346 (9th Cir. 1993) 3

Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) 6

Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899 (5th Cir. 1975) 9

International Assoc. of Entrepreneurs of America v. Angoff, 58 F.3d 1266 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 774 (1996) 7

Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Associates, Inc., 61 F.3d 608 (8th Cir. 1995), *cert. denied*, 133 L.Ed.2d 845 (1996) 1

Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Associates, Inc., 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994) 1, 3

Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980) 7

Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) 9

Myers v. Hertz Penske Truck Leasing, Inc., 572 F. Supp. 500 (N.D. Ga. 1983) 9, 10

TABLE OF AUTHORITIES – Continued

Page

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 7

Spring Garden Assocs. v. RTC, 26 F.3d 412 (3d Cir. 1994) 4

USF&G Co. v. Murphy Oil USA, 21 F.3d 259 (8th Cir. 1994) 4

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) ...5, 6

Younger v. Harris, 401 U.S. 37 (1971) 7

STATUTES

28 U.S.C. § 1367 4

28 U.S.C. § 1446(d) 9

Financial Institution Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1441a(*l*) (FIRREA) 3, 5

STATEMENT OF THE CASE

Respondent Blackwell Sanders Matheny Weary & Lombardi, L.C. ("Blackwell Sanders") incorporates by reference the factual statements in the opinion of the Eighth Circuit Court of Appeals. Pet. App. A at 1a-14a. Respondent also provides the following additional facts necessary to a full understanding of the petition:

Although KPERS now asks the Court to review the lower court's exercise of supplemental jurisdiction, KPERS did not challenge the assertion of that jurisdiction earlier when it had the opportunity. As the Eighth Circuit noted, KPERS initially appealed the district court's refusal to remand the action to state court after the RTC removed it. Pet. App. A at 3a. The Eighth Circuit held that the removal was proper. *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Associates, Inc.*, 4 F. 3d 614 (8th Cir. 1993) (KPERS I), *cert. denied*, 114 S. Ct. 2132 (1994). Later, the third-party claims against the RTC were dismissed (although the RTC remained in the case as an intervenor). Pet. App. A at 3a. KPERS asked the district court to remand the action to state court, but the district court refused. *Id.* KPERS did not appeal that ruling or the district court's subsequent refusal to reconsider the remand issue. Only after the Eighth Circuit held in *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Associates, Inc.*, 61 F. 3d 608 (8th Cir. 1995) (KPERS III), *cert. denied*, 133 L.Ed.2d 845 (1996), that KPERS was subject to a shorter, two-year statute of limitations, did KPERS again challenge the district court's jurisdiction.

With respect to petitioner's argument that the district court erred by enjoining pending state court proceedings,

there were no state court proceedings pending against respondent Blackwell Sanders at the time the preliminary injunction was issued. The state court action filed by KPERS against Blackwell Sanders had already been removed to federal court and KPERS had not filed any other state court actions against Blackwell Sanders. Pet. App. A at 4a. The district court enjoined KPERS from filing further claims against Blackwell Sanders in any other court "arising out of KPERS's investments in Home Savings Association." Pet. App. A at 34a.

REASONS FOR DENYING WRIT

There are two threshold grounds for denying the writ. First, the Court need not even reach petitioner's issue on whether the trial court properly exercised supplemental jurisdiction because there was an independent basis for federal jurisdiction below, a basis that petitioner does not now challenge. Second, deciding whether a federal district court abused its discretion in exercising supplemental jurisdiction in a fact-specific case is not an issue that warrants the Court's attention.[1] Petitioner's third issue – whether the district court should have enjoined the petitioner from relitigating already-decided issues in state court – is unremarkable. There is no conflict in the Circuits on this point.

[1] Petitioner's second issue is, by petitioner's own admission (Pet. at 13-14), wholly dependent on whether the Court grants certiorari on the first issue petitioner raises.

Because the questions presented by petitioner are not dispositive of the case below, because this case presents no significant conflict among the Circuits, and because review of an abuse of discretion case is not sufficiently important to merit the Court's consideration, the petition should be denied.

I. The Federal District Court Properly Exercised Subject Matter Jurisdiction Over This Case, Both On The Ground Now Challenged By Petitioner, And On An Independent Ground On Which Petitioner Does Not Seek Review

The federal district court in this case initially acquired jurisdiction under the Financial Institution Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1441a(*l*) ("FIRREA"), in which "Congress gave the RTC a broad right to remove any action." *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614, 619 (8th Cir. 1993) (KPERS I), *cert. denied*, 144 S. Ct. 2132 (1994). As the Eighth Circuit stated, "[w]hen the Home Savings directors brought the RTC into the action as a third-party defendant, the RTC had the right to remove 'the entire case' to federal court." *Id.* at 618 (quoting *California v. Keating*, 986 F.2d 346, 348-49 (9th Cir. 1993)). It is uncontested that this removal was proper initially.

Once the trial court obtained jurisdiction over this case, it obtained jurisdiction over the *entire action* under the FIRREA removal provision, 12 U.S.C. § 1441a(*l*)(1), which provides that the "civil action" to which the RTC is a party is "deemed to arise under the laws of the United States" and is "within the original jurisdiction of the

district court." Pet. App. A at 6a; *Spring Garden Assocs. v. RTC*, 26 F.3d 412, 417 (3d Cir. 1994). Because the district court possessed both arising-under and supplemental jurisdiction, and because petitioner now challenges only supplemental jurisdiction, this case can be affirmed on an independent ground not challenged by petitioner. It is thus a poor candidate for certiorari.

Even if the Court were to reach the supplemental jurisdiction question, petitioner does not raise any question worthy of review. A district court's decision to retain jurisdiction under section 1367(c) is reviewable under the abuse of discretion standard. *USF&G Co. v. Murphy Oil USA*, 21 F.3d 259, 263 (8th Cir. 1994) (holding that the trial court rulings on supplemental jurisdiction and abstention will be reversed "only if we determine, giving the district court the deference it is due, the district court abused its considerable discretion"). As the Eighth Circuit stated in *Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985):

> A federal court has the power . . . to retain jurisdiction where the party giving rise to federal jurisdiction has been dismissed. . . . When removal jurisdiction is premised on a federal defendant who is subsequently dismissed, the decision to remand the remaining claims is committed to the district court's discretion.

Id. at 654.

Here there are at least three reasons why the trial court did not abuse its discretion in deciding to exercise supplemental jurisdiction. First, the RTC was only dismissed as a third-party defendant; it remains as a limited intervenor in this case. Thus, if the case were remanded, the RTC could once again seek removal if it believed its

rights as receiver for Home Savings were at risk. Second, the trial court had already devoted substantial time to this case, and feared a state court would have difficulty becoming as knowledgeable.[2] Judicial economy thus disfavored remand. Third, the trial court believed the parties would receive a fairer hearing in federal court. Besides the fact that all Kansas state judges participate in petitioner KPERS's retirement plan, the trial court was specifically concerned that a Kansas trial court judge had tried to prevent removal by severing the third-party claims against the RTC in an *ex parte* hearing. Pet. App. at 2a. Therefore, all three of the factors considered in determining whether to remand (convenience, judicial economy, and fairness) favored keeping the case in federal court. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Petitioner claims that the Eighth Circuit's opinion conflicts with opinions of the Seventh and District of Columbia Circuits on the issue of whether the exercise of supplemental jurisdiction is a jurisdictional question. Before the Court could reach this alleged conflict, however, it would first have to find that the district court did not have arising-under jurisdiction under 12 U.S.C. § 1441a(*l*), and then would have to find that the trial court abused its discretion in exercising supplemental jurisdiction. Absent these two preliminary findings, any alleged conflict between the Circuits would not affect the outcome of this case.

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[2] The trial court noted (Pltf. App. 762) that "I have spent more time on this case already than I have spent on any other case but one in the last ten years."

There is in any event no significant conflict among the Circuits that requires the Court's attention. Petitioner seizes on a footnote in the Eighth Circuit's opinion questioning whether the decision "to retain a case after dismissing federal claims is jurisdictional." Pet. App. at 7a n.3. Once again, however, this statement was not necessary to the Eighth Circuit's holding because there was an independent basis – arising-under jurisdiction – for jurisdiction in the trial court. In any event, the Eighth Circuit has correctly read the Court's decisions in *Gibbs*, 383 U.S. 715, and *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349 (1988). There is no dispute here that federal jurisdiction was present at the time of removal. The trial court's decision to exercise supplemental jurisdiction after dismissal of the RTC is plainly a discretionary matter under *Gibbs* and *Cohill*. As the Court expressly noted in *Cohill*, "*Gibbs* drew a distinction between the power of a federal court to hear state-law claims and the discretionary exercise of that power." 484 U.S. at 349. This case concerns only the latter, discretionary exercise of jurisdictional power.

This case is a poor choice for certiorari because the conflict petitioner alleges was unnecessary to the outcome below. This case concerns discretion under *Cohill* and *Gibbs*. Despite petitioner's assertions, the lower courts do not need guidance in this area.

II. The Court Should Not Issue An Advisory Opinion On How To Apply Principles Of Abstention And Comity To The Particular Facts Of This Case

Petitioner's second question seeks the Court's advice on how principles of abstention and comity should be applied to the particular facts of this case should the Court grant certiorari and remand for further proceedings. But as petitioner itself admits (Pet. at 13-14), this issue becomes important, if at all, only if the Court grants certiorari on petitioner's first question.

Petitioner relies extensively on this Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971), to support its argument that the trial court should have abstained from hearing the merits of this case, and remanded it to Kansas state courts. The *Younger* abstention doctrine, however, is inapplicable where a federal district court has exclusive jurisdiction over a claim. *International Assoc. of Entrepreneurs of America v. Angoff*, 58 F.3d 1266, 1271 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 774 (1996); *Levy v. Lewis*, 635 F.2d 960, 967 (2d Cir. 1980). "The doctrine of abstention is premised on the idea that a federal court may defer to a state court confronted with a similar controversy: there is no need for abstention unless the state and federal courts have concurrent jurisdiction of an issue or case." *Angoff*, 58 F.3d at 1271. Only where there is a *pending* state court proceeding involving state interests "so important that exercise of the federal judicial power would disregard the comity between the States and the National Government" is the *Younger* doctrine applicable. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). There is no pending state court proceeding against respondent Blackwell Sanders involving these issues. Accordingly, *Younger* does not apply. *See,*

e.g., In re Burns & Wilcox Ltd., 54 F.3d 475, 478 (8th Cir. 1995). Moreover, petitioner has not alleged any significant state interest sufficient to outweigh the benefit of judicial economy gained by finally resolving this dispute in federal court.

Petitioner also claims that comity supports a remand, suggesting that the district court must address state law issues that have not arisen in Kansas courts. Although petitioner contends that complex issues of state law will arise (without convincingly explaining what they might be), there is nothing to prevent the trial court from resolving them. The claims made by petitioner are not novel, but instead involve familiar legal principles. The trial court need only apply Kansas law, not interpret it, a task it can perform as well as a Kansas court.

The statute of limitations issue that KPERS seeks to overturn has been briefed and argued on two levels of the federal judicial system. A remand now would threaten the authority of the federal courts' orders and judgments and thus, if anything, would run counter to federal-state comity. *Cf. In re Agent Orange Product Liability Litig.*, 996 F.2d 1425, 1432 (2d Cir. 1993) (abstention in deference to state courts is inappropriate where to do so "would threaten the authority of the federal judicial system and potentially nullify the federal court's orders and judgment"), *cert. denied*, 510 U.S. 1140 (1994).

III. Petitioner's Alleged Conflict Between The Circuits Is Nonexistent

Petitioner's last ground for granting certiorari is to resolve an allegedly "clear circuit conflict concerning the

proper scope of injunctions" under 28 U.S.C. § 1446(d). But far from presenting a conflict, the decisions of the Fifth and Ninth Circuits were cited by the Eighth Circuit in *support* of its position below. These three Circuits all agree that the scope of § 1446(d) is not limited to enjoining further prosecution of the specific case that was removed.

Under the general removal statute, once an action is removed, the state court loses jurisdiction and "shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). This statute gives the federal district court explicit authorization to enjoin parties from prosecuting the removed case in state court. The statute has also been interpreted to expressly authorize enjoining substantially similar state cases other than the removed case itself. Where, as here, a party threatens to circumvent the federal court's removal jurisdiction by filing a new state court lawsuit that is substantially the same as the removed action, the federal court may protect its jurisdiction by enjoining the filing or prosecution of the second suit. *Brown v. Seaboard Coast L.R.R.*, 309 F. Supp. 48, 49 (N.D. Ga. 1969); *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975) ("where a district court finds that a second suit filed in state court is an attempt to subvert the purposes of the removal statute, it is justified and authorized by [§ 1446(d)] in enjoining the proceedings in the state court"); *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988); *Myers v. Hertz Penske Truck Leasing, Inc.*, 572 F. Supp. 500, 501-03 (N.D. Ga. 1983) (characterizing what KPERS has done here as a "forum shopping maneuver").

The district court below made a specific finding that petitioner was attempting to subvert federal removal jurisdiction. Pet. App. A at 11a. Petitioner's own counsel admitted as much. *Id.* This action was properly removed to federal court, and petitioner's repeated efforts to obtain a remand failed. Petitioner cannot be allowed to file new state court suits arising out of its Home Savings investments without defeating the very removal that both the Eighth Circuit and the federal district court consistently found was valid. *See Myers*, 572 F. Supp. at 503 (where later-filed state case was "nothing more than a restatement of a properly removed case," federal court required to enjoin it). Petitioner's third question thus presents nothing of substance.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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Dated: September 20, 1996

(5)

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

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55 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to evaluate the hypothetical question of the district court's exercise of supplemental jurisdiction under 28 U.S.C. § 1367 where the court held that the district court had arising-under jurisdiction under 12 U.S.C. § 1441a.

2. Whether 28 U.S.C. § 1446(d) authorizes a district court to enjoin wholly duplicative state-court actions when it makes factual findings—that are unchallenged on appeal—that the state-court actions were filed to subvert federal removal jurisdiction.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed by the petitioner, the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Pursuant to Supreme Court Rule 29.6, respondent KPMG Peat Marwick LLP states that it is a limited liability partnership with no parent companies or subsidiaries. Respondent Robert W.L. Spence is an individual.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	iv
DECISIONS BELOW	2
COUNTERSTATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	6
CONCLUSION	14

TABLE OF AUTHORITIES

CASES Page

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).. 10
Boatmen's First Nat'l Bank v. KPERS, 57 F.3d 638 (8th Cir. 1995) 3
California v. Keating, 986 F.2d 346 (9th Cir. 1993) 7
Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) 8, 9
Faulkner v. Jones, 116 S. Ct. 331 (1995) 13
Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899 (5th Cir. 1975) 13
KPERS v. Reimer & Koger Assocs., Inc., 4 F.3d 614 (8th Cir. 1993) *("KPERS I")*, *cert. denied*, 114 S. Ct. 2132 (1994) 3, 4, 10, 12
KPERS v. Reimer & Koger Assocs., Inc., 60 F.3d 1304 (8th Cir. 1995) *("KPERS II")* 3
KPERS v. Reimer & Koger Assocs., Inc., 61 F.3d 608 (8th Cir. 1995) *("KPERS III")*, *cert. denied*, 116 S. Ct. 915 (1996) 3
KPERS v. Reimer & Koger Assocs., Inc., 85 F.3d 1353 (8th Cir. 1996) *("KPERS V")* 3
LaShawn A. v. Barry, 69 F.3d 556 (D.C. Cir. 1995), *vacated*, 74 F.3d 303 (D.C. Cir. 1996) 8
LaShawn A. v. Barry, 87 F.3d 1389 (D.C. Cir. 1996) (en banc) 8
Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980) 11
Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) 13
Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) 8
Myers v. County of Lake, Indiana, 30 F.3d 847 (7th Cir.), *cert. denied*, 115 S. Ct. 666 (1994) 9
Spring Garden Assocs. v. RTC, 26 F.3d 412 (3d Cir. 1994) 7
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 7
Trailmobile Co. v. Whirls, 331 U.S. 40 (1947) 11
United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 9, 10
United States v. Doe, 465 U.S. 605 (1984) 12

TABLE OF AUTHORITIES—Continued

Page

United States v. Johnston, 268 U.S. 220 (1925) 12
Webb v. GAF Corp., 78 F.3d 53 (2d Cir. 1996) 13
Younger v. Harris, 401 U.S. 37 (1971) 11

STATUTES

12 U.S.C. § 1441a ..... *passim*
28 U.S.C. § 1367 ..... 2, 6, 9, 11
28 U.S.C. § 1446(d) 13
KAN. STAT. ANN. § 60-522 (1992) 5

MISCELLANEOUS

H.R. REP. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 9
Order Granting KPMG/Peat Marwick's and Robert W.L. Spence's Motion for Summary Judgment, in *KPERS v. Reimer & Koger Assocs., Inc.*, No. 92-0922-CV-W-9 (W.D. Mo. Jul. 25, 1996) 2
ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 18.5, at 724 (7th ed. 1993) 13

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---

BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

KPMG Peat Marwick LLP and Robert W.L. Spence ("Peat Marwick") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by the Kansas Public Employees Retirement System ("KPERS").

The petition involves one of a series of procedural gambits by petitioner to circumvent an adverse ruling by the Eighth Circuit on the statute of limitations applicable to petitioner's garden-variety tort claims arising out of investment losses. Facing almost certain defeat as a result of the application of that ruling, petitioner took the extraordinary step of filing what the district court found to be wholly duplicative state-court actions. Petitioner did so, as its counsel candidly admitted at the time, to avoid

the application of the Eighth Circuit's decision and thus, as the district court found, to subvert federal removal jurisdiction.[1] Consequently, the district court entered the preliminary injunction that is the subject of this appeal.[2]

The question under 28 U.S.C. § 1367 raised by the petition—whether the exercise of supplemental jurisdiction after the dismissal of federal claims raises issues of subject-matter jurisdiction—is not worthy of this Court's attention. Any ruling by this Court on that issue would have no impact on the district court's jurisdiction over this case because the petition does not challenge the Eighth Circuit's principal holding that the district court had arising-under jurisdiction under 12 U.S.C. § 1441a. Moreover, there is no conflict among the courts of appeals about any aspect of the Eighth Circuit's decision affirming the district court.

DECISIONS BELOW

In addition to the decisions below referred to in the petition, on July 22, 1996, the district court ordered that the preliminary injunction challenged here be made permanent. *See* Appendix to Opposition, pp. 1a-2a, 5a-6a ("Opp. App.").[3] Petitioner has appealed the entry of the permanent injunction to the Eighth Circuit. *See id.*, pp. 9a-10a. The district court also granted summary judgment to Peat Marwick, *see* Order Granting KPMG/Peat Marwick's and Robert W.L. Spence's Motion for Sum-

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[1] Petitioner's other procedural gambits included a motion to reconsider the district court's year-and-a-half old ruling that KPERS performs proprietary, rather than governmental, functions and a motion to disqualify the district judge, which was rejected by the Eighth Circuit. *See* Appendix to Opposition, pp. 16a-17a, 21a-22a ("Opp. App.").

[2] That preliminary injunction has recently been superseded by a permanent injunction. As a result, there is no controversy for this Court to review concerning the preliminary injunction.

[3] This brief refers to the appendix to the petition as "Pet. App."

mary Judgment, in *KPERS v. Reimer & Koger Assocs., Inc.*, No. 92-0922-CV-W-9 (W.D. Mo. Jul. 25, 1996), and has now entered final judgment in favor of Peat Marwick, *see* Opp. App., pp. 7a-8a.

Subsequent to the decision appealed from here, the Eighth Circuit rejected petitioner's petition for a writ of mandamus directing the district judge to disqualify himself; that opinion is reported at 85 F.3d 1353 (8th Cir. 1996) ("*KPERS V*"). *See* Opp. App., pp. 11a-34a. Previously, the Eighth Circuit issued reported opinions in four other related interlocutory appeals, two of which this Court has declined to review. *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608 (8th Cir. 1995) ("*KPERS III*"), *cert. denied*, 116 S. Ct. 915 (1996); *KPERS v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304 (8th Cir. 1995) ("*KPERS II*"); *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614 (8th Cir. 1993) ("*KPERS I*"), *cert. denied*, 114 S. Ct. 2132 (1994).

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate in many respects. Nevertheless, for present purposes, only four corrections need be made.

1. The petition challenges the preliminary injunction that the district court entered against the action petitioner filed in Kansas state court against Peat Marwick after the Eighth Circuit issued its ruling on the statute of limitations. Before issuing the preliminary injunction, the district court specifically found (in the Eighth Circuit's words) that petitioner's newly filed state-court action against Peat Marwick was "an attempt to subvert the removal of the earlier case," [4] and that "the new suit was

[4] Although petitioner originally filed this case in Kansas state court, the RTC removed the entire action to federal court pursuant to 12 U.S.C. § 1441a(*l*)(3)(A) after a third-party complaint was

substantially identical to the old." Pet. App., p. 11a. Those findings were based in part on petitioner's own statement to the press that petitioner had filed the new state-court actions because of a "multitude of problems and issues that are causing delays in federal court, coupled with what we think is an erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations." *Id.*, p. 4a. The Eighth Circuit affirmed those findings, *id.*, and petitioner has not sought review of them here.

2. Petitioner's complaint about delay in federal court rings hollow: any delays in this litigation have been the result of petitioner's tactics. For example, after the third-party complaint was filed against the RTC, petitioner successfully moved the Kansas state judge, in an *ex parte* hearing with no notice to any defendant or to the RTC, to sever the third-party complaint from the rest of the action. Because of petitioner's improper conduct in state court, upon removal by the RTC the district court was forced to consider whether the RTC had removed the entire case or only the third-party complaint against it. After lengthy hearings, the district court held that the state court's severance order violated the Supremacy Clause and that the RTC had removed the entire case; the Eighth Circuit affirmed. *KPERS I*, 4 F.3d at 619. As another example, the Eighth Circuit recently observed that after its ruling on the statute of limitations, petitioner "undertook a flurry of actions which occupied the district court's time to the detriment of the efficient resolution of this case." Opp. App., p. 21a. In addition to filing the duplicative state-court actions, petitioner sought disqualification of the district judge, prompting the Eighth Circuit to comment: "[o]ur review of KPERS' pattern of conduct leads us to conclude that the defendants' allegation that KPERS' recusal motion and this petition were filed

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filed against it. The Eighth Circuit, in a ruling not challenged here, affirmed the initial removal to federal court. *KPERS I*, 4 F.3d at 622, *cert. denied*, 114 S. Ct. 2132 (1994).

for tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge, is correct." *Id.*, p. 23a.

3. Petitioner's representation that "the RTC had informed the district court that it had no interest in the case's remaining in federal court," Pet., p. 6, is grossly misleading. The RTC has been continually involved in this case to ensure that the claims being asserted by petitioner against certain defendants were not derivative claims that rightly belonged to the RTC as receiver of a failed savings and loan. In fact, the RTC itself moved to intervene in the case long before it was served with the third-party complaint; the Kansas state judge refused to rule on the RTC's motion to intervene for over five months, and it became moot after the third-party complaint was filed against the RTC. After the district court dismissed that third-party complaint against the RTC, it granted the RTC's motion to be a limited intervenor. Plaintiff's Appendix in the Eighth Circuit, pp. 772-74. Thus, the RTC remained involved in the case after the dismissal of the third-party complaint against it; it even attended many of the ensuing depositions to protect its interests.

4. Petitioner's characterization of this action as "civil fraud claims . . . pursued by Kansas in its sovereign capacity in lieu of a criminal prosecution," Pet., p. 3, is false. Peat Marwick has never been charged with an intentional tort, but only with negligence. There is no basis whatsoever for Kansas to bring any criminal action against Peat Marwick. Nor is this action pursued by Kansas in its sovereign capacity. The district court found that petitioner acted in a proprietary, as opposed to governmental, capacity, *see* Appendix of Peat Marwick in the Eighth Circuit, pp. 45-49, and petitioner did not appeal that ruling.[5]

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[5] Indeed, by enacting a statute of limitations applying *only* to petitioner, *see* KAN. STAT. ANN. § 60-522 (1992), not generally to

REASONS FOR DENYING THE PETITION

This petition presents no questions worthy of this Court's attention. The first question—which challenges only one of the Eighth Circuit's two alternative bases for jurisdiction and which thus would not change the result in this case—seeks a novel holding with respect to an area of law as to which there is no conflict among the courts of appeals. The second question, by its own terms, seeks an advisory opinion only. The third question presents no conflict among the courts of appeals, but rather is resolved by the district court's affirmed findings of fact. Finally, all three questions present no controversy for this Court to review because the preliminary injunction challenged here has been superseded by a permanent injunction, now on appeal to the Eighth Circuit.

1. *The answer to the petition's first question would have no effect on the outcome of this case.* The petition's first question—a challenge under 28 U.S.C. § 1367—attacks dicta only, as it ignores the principal, independent basis for the Eighth Circuit's decision: arising-under jurisdiction under 12 U.S.C. § 1441a. The Eighth Circuit explained:

> [U]nder 12 U.S.C. § 1441a(*l*)(1) once the RTC becomes a party to the case, the entire action is "deemed to arise under the laws of the United States" and is within the original jurisdiction of the district court. Therefore, the federal court has arising-under, *rather than supplemental*, jurisdiction even over the claims that do not involve the RTC.

Pet. App., p. 6 (emphasis added).[6] The petition does not

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the government, the Kansas legislature recognized that petitioner exercises proprietary functions subject to a statute of limitations.

[6] The Eighth Circuit further stated:

> We conclude that the purpose of the RTC removal statute, 12 U.S.C. § 1441a(*l*), is to provide a federal forum for the

challenge the Eighth Circuit's principal holding—that the district court had arising-under jurisdiction under § 1441a —which is consistent with the holding of every other court of appeals to have considered the issue.[7] Thus, even if this Court were to find petitioner's supplemental-jurisdiction arguments to be legally correct, that issue could have no effect on this case.[8] This Court should not grant certiorari to review an issue that, because of an unchallenged alternative holding, is of no importance to the particular case before the Court. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).[9]

In any event, even assuming away, *arguendo*, the Eighth Circuit's principal holding, certiorari on the supplemental-jurisdiction question would not be warranted. First, there is no conflict among the courts of appeals on

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entirety of any case to which the RTC is a party at the time of removal.

Pet. App., p. 12.

[7] *E.g., Spring Garden Assocs. v. RTC*, 26 F.3d 412, 415-16 (3d Cir 1994) (§ 1441a(*l*)(1) confers original federal jurisdiction over "the entirety of any case to which the RTC is a party and not just those claims in such a case brought by or against the RTC"); *California v. Keating*, 986 F.2d 346, 348 (9th Cir. 1993) ("the addition of the RTC as a party transforms the entire action into one that 'arises under' the laws of the United States").

[8] Petitioner apparently recognizes this problem, as it attempts to relegate the Eighth Circuit's independent holding to a "brief[] suggest[ion]." Pet., p. 11 n.10. This mischaracterizes the Eighth Circuit's decision. Far from being a brief suggestion, the Eighth Circuit's holding that the district court had arising-under jurisdiction under § 1441a is its principal holding.

[9] The issue whether a federal court has arising-under jurisdiction under § 1441a over all claims even when claims involving the RTC are dismissed before trial is unlikely to recur. Not only are there extremely few cases removed under § 1441a in which the RTC is not a party to the end—indeed the RTC even remained a limited intervenor in this case after the third-party complaint against it was dismissed—but also the RTC ceased to exist after December 1995, *see* 12 U.S.C. § 1441a(m).

this subject: petitioner's attempt to fashion such a conflict relies on dictum only and does not take account of this Court's opinion in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349-50 (1988). Second, exercising supplemental jurisdiction was not an abuse of discretion under the peculiar circumstances of this case, all of which were omitted from the petition.

In attempting to fashion a conflict among the courts of appeals, petitioner relies heavily on what it characterizes as the Eighth Circuit's "admitted conflict with decisions in two other circuits." Pet., p. 11. There is no such conflict. The first alleged "conflict" is with *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996) (en banc). Although the panel opinion, 69 F.3d 556 (D.C. Cir. 1995), *vacated*, 74 F.3d 303 (D.C. Cir. 1996), which the Eighth Circuit refused to follow, *see* Pet. App., p. 7a n.3, did hold that the decision to exercise supplemental jurisdiction involves subject-matter jurisdiction, the en banc court held the opposite: it stated that the decision to exercise supplemental jurisdiction "is *not* a jurisdictional determination." 87 F.3d at 1369 (emphasis added). Petitioner's understandable affection for the dissent notwithstanding, the en banc opinion is squarely in agreement with the Eighth Circuit's decision. The other purported "conflict" is with a footnote in *Maguire v. Marquette University*, 814 F.2d 1213, 1218 n.4 (7th Cir. 1987), in which the Seventh Circuit states that the question whether the district court should have exercised pendent jurisdiction "is jurisdictional." [10] The Seventh Circuit, however, recently

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[10] Given that in *Maguire* the Seventh Circuit itself treats the question as discretionary—the court held that because "the district court did not articulate, nor does the record reveal, any pressing reasons for retaining jurisdiction over the plaintiff's pendent state law academic freedom claim," "it was therefore an abuse of discretion for it to do so," *id.* at 1218—that footnote is at most dictum. Moreover, *Maguire* was decided before this Court reiterated the discretionary nature of pendent jurisdiction in *Cohill*, 484 U.S. at 349-50.

addressed petitioner's precise question and held that even where a lower court improperly exercises supplemental jurisdiction, it nevertheless has subject-matter jurisdiction over the case. *Myers v. County of Lake, Indiana*, 30 F.3d 847, 849-50 (7th Cir.), *cert. denied*, 115 S. Ct. 666 (1994). Thus, there is no conflict among the circuits.

Not only is there no conflict among the courts of appeals on this issue, but also the Eighth Circuit's refusal to consider petitioner's untimely challenge[11] to the district court's exercise of supplemental jurisdiction is clearly correct. The plain language of § 1367—"district courts *may* decline to exercise supplemental jurisdiction over a claim" (emphasis added)—indicates that the decision to exercise supplemental jurisdiction implicates discretion only, and not subject-matter jurisdiction.[12] Such an interpretation of § 1367 is consistent with this Court's holding regarding pendent jurisdiction in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966), and its discussion of the *Gibbs* holding in *Cohill*, 484 U.S. at 349-50. In addition, the courts of appeals regularly treat the decision to exercise supplemental jurisdiction under § 1367 as involving discretion only, and not subject-matter jurisdiction, even where the decision to exercise supplemental jurisdiction was inappropriate. *E.g., Myers*, 30 F.3d at 849-50.

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[11] Petitioner did not seek appellate review of the district court's June 1994 decision to exercise supplemental jurisdiction after dismissing the third-party complaint against the RTC, but did so immediately after the Eighth Circuit's July 1995 ruling on the applicable statutes of limitations, a ruling that has proved to be dispositive.

[12] The legislative history confirms this. *See* H.R. REP. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 ("[§ 1367(c)] codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim, *even though it is empowered to hear the claim*" (emphasis added)).

Moreover, the district court did not abuse its discretion in retaining jurisdiction under the peculiar circumstances of this case, because there are no complex decisions of state law presented [13] and because considerations of judicial economy, convenience, and fairness to the litigants all favor the exercise of supplemental jurisdiction. *See Gibbs*, 383 U.S. at 726. Considerations of judicial economy continue strongly to favor a denial of remand: as of June 1994, when the district court decided to exercise supplemental jurisdiction over the remaining claims after dismissing the third-party complaint against the RTC, the district court had already spent more time on this case than on any other except one, *see* Opp. App., p. 12a, and a year's worth of intensive discovery followed, *see id.*, p. 16a. Convenience also favors the retention of jurisdiction: the federal courts have had jurisdiction over this complex multi-party case since 1992, *see KPERS I*, 4 F.3d at 616, and the district court has now entered final judgment in favor of all of the defendants but one, Opp. App., pp. 1a, 4a-8a.

Finally, the fairness factor also favors continued exercise of supplemental jurisdiction. Kansas state court judges are beneficiaries of KPERS and stand to gain from a judgment in its favor. *Cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986) (Due Process Clause forbids state judge from hearing case from which he stands to benefit financially), and cases cited therein. In addition, after the third-party complaint was filed against the RTC, the Kansas state judge "acted *ex parte* with the stated purpose of limiting the RTC's right to remove" when he severed the third-party complaint filed against the RTC from the underlying action in violation of the Supremacy Clause. *KPERS I*, 4 F.3d at 619.

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[13] The Eighth Circuit described this case as follows: "KPERS has sued several defendants to recover money it lost in a bad investment. This case only requires the conduct of the defendants be measured against the duties imposed by tort and securities law." Pet. App., p. 13a.

2. *The second question inappropriately seeks an advisory opinion.* The petition's second question—which also involves 28 U.S.C. § 1367—again ignores the fact that the principal holding below is based on 12 U.S.C. § 1441a. Moreover, not only is the second question entirely dependent on the acceptance of the first question and on agreement with petitioner that decisions to exercise supplemental jurisdiction after dismissal of the federal claims involve subject-matter jurisdiction, the petition concededly seeks an advisory opinion only: it simply asks this Court to "clarify for the Eighth Circuit on remand, and for the courts of appeals generally, the relevance under Section 1367(c) of abstention doctrines and other principles of comity." Pet., p. 14. It is well established, however, that this Court does not render advisory opinions. *E.g., Trailmobile Co. v. Whirls,* 331 U.S. 40, 48 (1947).

Another flaw in the second question is its premise, *viz.*, that the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971), would bar an injunction in this case. Under *Younger,* a federal court may not enjoin a pending criminal prosecution that is brought in good faith. *Id.* at 54. Despite the petition's repeated mischaracterizations, Peat Marwick has never been charged with an intentional tort, much less with any fraud for which it could have been criminally prosecuted. *See* Pet., p. 14. In addition, as the Eighth Circuit correctly held, Pet. App., pp. 13a-14a, abstention under *Younger* is inappropriate where, as here, federal courts have exclusive jurisdiction over an action. *E.g., Levy v. Lewis,* 635 F.2d 960, 967 (2d Cir. 1980).[14] Yet the petition does not challenge the Eighth Circuit's holding that under 12 U.S.C. § 1441a, the district court has exclusive jurisdiction over this case. *See* Pet. App., p. 13a.

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[14] There is no conflict among the courts of appeals regarding this issue.

3. *The third question is contrary to the facts found by the district court.* With its third question, the petition seeks to have this Court hold that federal courts cannot enjoin later-filed state-court actions "crafted 'for the purpose of subverting federal removal jurisdiction.'" Pet., p. 16. As phrased, the third question does not apply to this case because its factual prerequisites—that the state-court case is a "separate" case that is "legally distinct" from the removed case—are not met here. Rather, as the district court found (and the Eighth Circuit affirmed), petitioner's new state-court action "was substantially identical to the old" and "was an attempt to subvert the removal of the earlier case." Pet. App., p. 11a.[15] Petitioner does not challenge those factual findings in its petition.[16]

Not only does the question presented have no applicability to the facts of this case,[17] but also there is no conflict between the courts of appeals on this issue. No court of appeals has ever held that a litigant may subvert the removal jurisdiction of the federal courts by later filing a wholly duplicative action in state court. Far from

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[15] Indeed, any state-court action in this case would necessarily subvert federal removal jurisdiction because the Eighth Circuit held—and that holding is not challenged here—that the district court had *exclusive* jurisdiction over the *entire case* by virtue of 12 U.S.C. § 1441a. *See* Pet. App., p. 14a. Any cases where the statutory grant of jurisdiction is (a) concurrent and (b) extends only to a particular claim would not be comparable.

[16] Even if petitioner had challenged those factual findings, that would not warrant a writ of certiorari. It is well established that this Court does not "grant a certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), much less findings of fact "in which two courts below have concurred," *United States v. Doe*, 465 U.S. 605, 614 (1984).

[17] Petitioner's contention that "neither the 1991 nor the 1995 suits filed by petitioner in Kansas state court were removable," Pet., p. 16, begs the question: the 1991 suit was removed under 12 U.S.C. § 1441a, and the Eighth Circuit affirmed that removal, *see KPERS I*, 4 F.3d at 622. Petitioner does not here challenge the initial removal.

creating a circuit conflict, the cases cited in the petition recognized the rule applied by the Eighth Circuit, but found that it did not apply to their facts.[18]

4. *The preliminary injunction has been superseded.* This Court should not grant certiorari because none of the three questions presents a continuing controversy for this Court to review. The petition challenges the Eighth Circuit's affirmance of a preliminary injunction which has been superseded by a permanent injunction. *See* Opp. App., pp. 1a-2a, 5a-6a. Petitioner has separately appealed that permanent injunction to the Eighth Circuit. *Id.*, pp. 9a-10a. The appeal from the preliminary injunction is therefore superseded. *E.g., Webb v. GAF Corp.*, 78 F.3d 53, 56 (2d Cir. 1996) (per curiam). In these circumstances, the petition should be denied. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 18.5, at 724 (7th ed. 1993); *cf. Faulkner v. Jones*, 116 S. Ct. 331 (1995) (dismissing petition).

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[18] In *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975), the Fifth Circuit stated that where "a district court finds that a second suit filed in state court is an attempt to subvert the purposes of the removal statute, it is justified and authorized by § 1446(e) [now § 1446(d)] in enjoining the proceedings in the state court." The Fifth Circuit nevertheless vacated the injunction challenged in that appeal because the second suit, which added an additional defendant, "was not brought in an attempt to subvert the purposes of the removal statute and was not aimed at defeating federal jurisdiction." *Id.* Similarly, in *Lou v. Belzberg*, 834 F.2d 730, 741 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988), the Ninth Circuit recognized that an injunction is proper if the district court finds that a second state-court action was filed in an attempt to subvert the purposes of the removal statute. The Ninth Circuit nevertheless held that no injunction was authorized in that case because the second suit, which involved different plaintiffs, additional counsel, additional defendants, and only state claims, had not been filed in an attempt to subvert the purposes of the removal statute. *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 20, 1996

* Counsel of Record

APPENDIX A

[Filed Jul. 22, 1996]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Case Number: 92-0922-CV-W-9
95-0819-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

1) because there is no just reason for delay and for the reasons stated in the order dated June 3, 1996, judgment is entered in favor of I.I. Ozar, the Estate of Frank Morgan, Sherman Dreiseszun, Frank Sebree, Reimer & Koger Associates, Inc., Ron Reimer, Ken Koger, Clifford Shinski, Brent Messick, Robert Crew and Shook Hardy and Bacon and against plaintiff on all claims asserted against these defendants in plaintiff's Amended Complaint;

2) defendants' request that the September 28, 1995, preliminary injunction be made permanent is granted;

3) KPERS is permanently enjoined from filing in any other court, claims arising out of KPERS' investments in Home Savings against the following defendants: Shook Hardy and Bacon; Frank Sebree; KPMG Peat Marwick; Robert W. L. Spence; Reimer & Koger Associates, Inc.; Ronald Reimer; Kenneth Koger; Robert Crew; Clifford Shinski; Brent Messick; and Blackwell Sanders Matheny Weary & Lombardi; and

4) the $500 bond submitted to the Clerk of the Court by each defendant at the time the preliminary injunction was entered shall be applicable to the permanent injunction.

[Entered On Jul. 22, 1996]

Date July 22, 1996

R. F. CONNOR
Clerk

/s/ Tina Duer
(By) Deputy Clerk

APPENDIX B

[Filed Jul. 22, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 92-0922-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Defendants,

FRANK MORGAN, *et al.*,
Defendants and
Third-Party Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,
Third-Party Defendant.

No. 95-0819-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

BLACKWELL SANDERS MATHENY
WEARY & LOMBARDY, L.C., *et al.*,
Defendants and
Third-Party Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,
Third-Party Defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR FINAL JUDGMENT PURSUANT TO RULE 54 AND GRANTING DEFENDANTS' MOTION FOR PERMANENT INJUNCTION

On June 3, 1996, I issued an order granting summary judgment in favor of Reimer & Koger Associates, Inc., Kenneth Koger, Ron Reimer, Clifford Shinski, Brent Messick, and Robert Crew (the Reimer & Koger defendants); I.I. Ozar, Sherman Dreiseszun, and the Estate of Frank Morgan (the HSA defendants); Frank Sebree; and Shook, Hardy & Bacon (Shook Hardy) because KPERS' claims asserted against those defendants are barred by the applicable Kansas statute of limitations.

After the June 3, 1996, order was issued, the HSA defendants moved for a final judgment under Rule 54(b), Federal Rules of Civil Procedure.

During a hearing on June 28, 1996, the Reimer & Koger defendants, Shook Hardy and Frank Sebree, joined in the HSA defendants' motion. KPERS' counsel stated that KPERS did not oppose the motion as long as all parties whose summary judgment motions were decided in the June 3, 1996, order were included in the Rule 54(b) final judgment.

Rule 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

No just reason exists for delay in entering a final judgment pursuant to Rule 54(b), in favor of all the defendants in Case No. 92-0922 who prevailed in the June 3,

1996, order. Thus, defendants' Motion for a Final Judgment Under Rule 54(b) will be granted.

Also during the June 28, 1996, hearing, Shook Hardy's counsel requested that as part of the Rule 54(b) final judgment entered in this case the preliminary injunction entered on September 28, 1995, be made permanent. (The preliminary injunction prohibited KPERS from filing, in any other court, claims against the defendants named in that order arising out of KPERS' investments in Home Savings.) Defendant Frank Sebree joined in the motion. KPERS requested an opportunity to file a written response to the oral motion.

On July 5, 1996, I issued an Order Directing KPERS to Show Cause Why Permanent Injunction Should Not Issue.

By letter dated July 16, 1996, KPERS responded to the Show Cause order. In its letter, KPERS states that it opposes the request that a permanent injunction be entered for all the reasons it objected to the entry of the preliminary injunction. In addition, KPERS asserts that Shook Hardy has not articulated any good cause for a permanent injunction.

After receiving an adverse ruling on the statute of limitations from the Eighth Circuit Court of Appeals, KPERS brought suit in Kansas against Blackwell Sanders Matheny Weary & Lombardi (Blackwell Sanders) and many of the defendants in Case No. 92-0922 asserting the same claims that had been pending for years in this court. Without the injunction I entered on September 28, 1995, I am persuaded that KPERS might again embark on a program of suing the defendants in Case No. 92-0922 and Blackwell Sanders in Kansas asserting the same claims asserted in those cases. For this reason, I restate as if fully set out in this order the findings of facts and conclusions of law stated on the record at the September 28, 1995, hearing when I granted defendants'

motion for preliminary injunctive relief. In order to protect the jurisdiction of this court and to protect the defendants from needless expense and repetitive litigation, defendants' motion that KPERS be permanently enjoined from bringing suit against them in any other court for claims arising out of KPERS' investment in Home Savings will be granted.

Accordingly, it is ORDERED that:

1) because there is no just reason for delay and for the reasons stated in the order dated June 3, 1996, judgment is entered in favor of I.I. Ozar, the Estate of Frank Morgan, Sherman Dreiseszun, Frank Sebree, Reimer & Koger Associates, Inc., Ron Reimer, Ken Koger, Clifford Shinski, Brent Messick, Robert Crew and Shook Hardy and Bacon and against plaintiff on all claims asserted against these defendants in plaintiff's Amended Complaint;

2) defendants' request that the September 28, 1995, preliminary injunction be made permanent is granted;

3) KPERS is permanently enjoined from filing in any other court, claims arising out of KPERS' investments in Home Savings against the following defendants: Shook Hardy and Bacon; Frank Sebree; KPMG Peat Marwick; Robert W. L. Spence; Reimer & Koger Associates, Inc.; Ronald Reimer; Kenneth Koger; Robert Crew; Clifford Shinski; Brent Messick; and Blackwell Sanders Matheny Weary & Lombardi; and

4) the $500 bond submitted to the Clerk of the Court by each defendant at the time the preliminary injunction was entered shall be applicable to the permanent injunction.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
United States District Court

Kansas City, Missouri

July 22, 1996.

APPENDIX C

[Filed Sept. 9, 1996]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Case Number: 92-0922-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Defendants.

JUDGMENT IN A CIVIL CASE

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of KPMG Peat Marwick L.L.P. and Robert W. L. Spence.

Date September 9, 1996

R. F. CONNOR
Clerk

Entered on Sep. 9, 1996

/s/ Tina Duer
(By) Deputy Clerk

APPENDIX D

[Filed Sept. 9, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 92-0922-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Defendants,

FRANK MORGAN, *et al.*,
Defendants and
Third-Party Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,
Third-Party Defendant.

ORDER ENTERING JUDGMENT

KPMG Peat Marwick L.L.P. and Robert W. L. Spence's Motion for Summary Judgment was granted on July 25, 1996. Peat Marwick and Spence move for entry of final judgment under Rule 54(b), Federal Rules of Civil Procedure.

Because there is no just reason for delay in entering final judgment on plaintiff's claims against Peat Marwick and Spence, judgment is entered in favor of KPMG Peat Marwick L.L.P. and Robert W. L. Spence.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
United States District Judge

Kansas City, Missouri
September 9, 1996.

APPENDIX E

[Filed Aug. 20, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Civil Action No.
92-0922-CV-W-9
95-0819-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Kansas Public Employees Retirement System (KPERS), plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit the Judgment entered in favor of defendants I.I. Ozar, the Estate of Frank Morgan, Sherman Dreiseszun, Frank Sebree, Reimer & Koger Associates, Inc., Ron Reimer, Ken Koger, Clifford Shinski, Brent Messick, Robert Crew and Shook Hardy and Bacon and against plaintiff on all claims asserted against these defendants in plaintiff's Amended Complaint and permanently enjoining KPERS from filing in any other court, claims arising out of KPERS' investments in Home Savings against those defendants and KPMG Peat Marwick; Robert W. L. Spence; and Blackwell Sanders Matheny

Weary & Lombardi, entered in this action on the twenty-second day of July, 1996.

Respectfully submitted,

/s/ [Illegible]
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APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-4061

IN RE: KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Petitioner.

Submitted: January 11, 1996

Filed: June 11, 1996

Before McMILLIAN, JOHN R. GIBSON, and HANSEN, Circuit Judges

PETITION FOR WRIT OF MANDAMUS

HANSEN, Circuit Judge.

On December 7, 1995, Kansas Public Employees Retirement System (KPERS) filed a petition seeking a writ of mandamus directing the district judge [1] to disqualify himself under 28 U.S.C. § 455(a), (b)(1), and (b)(5)(iii). In addition, KPERS filed a motion to stay the pending district court proceedings until this court ruled on the mandamus petition. After hearing oral arguments, we denied the stay. We now deny the petition.

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[1] The Honorable D. Brook Bartlett, Chief Judge, United States District Court for the Western District of Missouri.

I.

KPERS filed the basic underlying suit in which recusal is sought in Kansas state court in 1991, seeking damages allegedly sustained in 1986 in connection with KPERS' investments in Home Savings Association. Much of the litigation has involved attempts to control the choice of forum, with KPERS preferring a Kansas state court forum and the defendants preferring to bring this case to and keep it in federal court. After forging a winding trail, the case has again arrived at our doorstep. We set forth only those facts bearing on the issue before us—whether we should direct the district court to disqualify himself under 28 U.S.C. § 455.[2]

On October 18, 1994, approximately two years after the case had been removed from Kansas state court to federal district court in the Western District of Missouri and assigned to the Honorable D. Brook Bartlett, United States District Judge,[3] three parties filed motions to intervene. These parties were Boatmen's First National Bank of Kansas City, Missouri (Boatmen's) and the law firms of Blackwell Sanders Matheny Weary and Lombardi,

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[2] For more details on the facts of the underlying suit, see *KPERS v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063 (8th Cir. 1996) (affirming district court's enjoining KPERS from filing lawsuits in Kansas based on same claims sued on in federal court); *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608 (8th Cir. 1995) (reversing district court's decision that 10-year Kansas statute of limitations applied and remanding for determination of which of two shorter statutes apply), *cert. denied*, 116 S. Ct. 915 (1996); *KPERS v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304 (8th Cir. 1995) (reversing the district court's denial of Blackwell's application to intervene); *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614 (8th Cir. 1993) (affirming district court's order denying KPERS' motion to remand the case to state court), *cert. denied*, 114 S. Ct. 2132 (1994).

[3] By this time, Judge Bartlett had already spent a great deal of time on this case. (Tr. of Proceedings of 6/30/94, at 191 (stating that the court had already spent more time on this case than any other case but one in 10 years).)

L.C. (Blackwell) and *Shook Hardy & Bacon, P.C.* (Shook).[4] Judge Bartlett immediately informed the parties that attorneys in Blackwell's trust, estate, and taxation departments had provided him routine estate planning advice, had probated his deceased father's estate, and were probating his mother's estate, of which Judge Bartlett was a primary beneficiary. Judge Bartlett explained that the estate planning work for him was substantially complete[5] and that he was seeking no further legal advice from the firm. The court asked the parties to anonymously submit in writing any objections to his presiding over the case by noon, November 3, 1994.

On October 26, 1994, Judge Bartlett *sua sponte* disqualified himself from presiding over the applications to intervene and had them reassigned to another federal district judge.[6] Judge Bartlett recused himself from deciding Boatmen's application because he owned stock in Boatmen's parent company. His disqualification from deciding Shook's and Blackwell's applications stemmed from a concern that his rulings on these applications would affect Boatmen's application. Boatmen's motion to intervene was eventually stayed, and Boatmen's then filed a separate declaratory judgment action over which Judge Bartlett does not preside. *See Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995).

Noon, November 3, 1994, came and went, and no one, including KPERS, objected to the potential conflict involving Blackwell. That afternoon, however, another potential conflict arose. Shook advised the parties that it

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[4] Shook and Blackwell moved to intervene after KPERS notified them of KPERS' intention to file a separate suit against them in state court.

[5] All that remained was a transfer of some insurance to a new trust.

[6] The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

had offered a summer associate position to Judge Bartlett's daughter, Ms. Amanda Mook.

The following day, November 4, 1994, the court informed the parties that his daughter had accepted the offer from Shook and also that his son was probably a member of KPERS because he was the assistant city manager of the City of Hays, Kansas. The judge asked for comments on these matters, but no one offered any at that time.

The court followed up with a letter to the parties on November 9, 1994, restating the facts regarding his son and daughter and inviting anonymous objections to be submitted by November 21, 1994. KPERS, in a letter of November 18, 1994, expressing concern about Judge Bartlett's continued participation in the case because of his daughter's relationship with Shook, stated:

> Previously, we expressed no objection to Judge Bartlett's continued role as judge in this litigation by reason of his involvement with the estate and probate attorneys at Blackwell Sanders. By itself, we did not believe that Judge Bartlett's involvement with the Blackwell firm warranted significant concern.

(App. Pet'r at 195.) In KPERS' letter of November 21, 1994, it stated:

> Judge Bartlett previously notified the parties that he had retained Blackwell, Sanders for personal estate matters. The court required the parties to file by 12:00 p.m., November 3, 1994 notice of objections to Judge Bartlett continuing to preside over the case. All parties notified the court that they did not object.

(App. Pet'r at 173.) The letter then refers to the hiring of Judge Bartlett's daughter by Shook, and continues:

> Despite their previous waiver, the parties should not be precluded from asserting the Judge's retention of

> Blackwell, Sanders in conjunction with Shook, Hardy's hiring of Judge Bartlett's daughter or the matters related to Boatmen as grounds for recusal. While each situation alone might not constitute sufficient grounds, all situations considered together might.

Id.

The court addressed the pending objection at KPERS' specific request at a hearing on December 16, 1994. At that time, KPERS volunteered that it had submitted the November 18 and 21 letters, and asked the court to recuse himself. KPERS noted that, although Shook was not yet a party, a partner of Shook was, and the partner had brought an indemnity claim against Shook. Judge Bartlett declined to disqualify himself, because he was persuaded by KPERS' original argument that consideration of recusal was premature until Shook's motion to intervene had been granted.

On December 29, 1994, Judge Whipple granted Shook its motion to intervene. KPERS took no action to renew its recusal request. In denying Blackwell's motion to intervene, Judge Whipple, considering the question of whether Judge Bartlett would have to recuse if Blackwell were allowed to intervene, made the following statement: "Considering the intervention of Blackwell Sanders, KPERS has expressly waived any objection to Judge Bartlett continuing to preside over the pending litigation." (App. Pet'r at 210.) In the appeal to this court by Blackwell on the issue of intervention, KPERS in its brief made no issue as to whether Judge Bartlett would be required to recuse, or to request that he do so. We reversed the district court's denial and permitted Blackwell to intervene by our decision filed July 27, 1995. No motion for rehearing or suggestion for rehearing en banc was filed. So, by the end of July 1995, Blackwell's intervention was assured, and Judge Bartlett's daughter was working at Shook as a summer associate. Still, KPERS took no

action to renew its recusal request. During the ten-month period between December 1994 and October 1995, the parties engaged in full-blown discovery, deposing more than 60 witnesses, disclosing dozens of expert witnesses, and producing millions of pages of documents. Although the parties participated in several pretrial conferences with the court, no one reasserted any issue of any potential conflict of interest on the part of Judge Bartlett during this period involving Boatmen's, Blackwell, or Shook.

In the meantime, on July 27, 1995, we reversed the district court's ruling on the applicable statute of limitations for this case. Our ruling held that the ten-year statute of limitations did not apply to this case, and we remanded for a determination of which of two shorter Kansas statutes of limitations applied. *KPERS v. Reimer & Koger Assocs. Inc.*, 61 F.3d 608 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 915 (1996). Shortly thereafter, KPERS filed a motion asking the district court to reconsider its April 1994 holding that KPERS was acting in a proprietary capacity and was thus subject to the statute of limitations—a decision KPERS did not attempt to appeal to this court. In addition, KPERS filed duplicative suits in Kansas state court and filed its third motion to remand this case back to state court. In response, the defendants filed motions seeking preliminary injunctions prohibiting KPERS from filing additional suits against the defendants. The district court granted the preliminary injunctions [7] and set a hearing for October 18, 1995, to address several issues, including KPERS' motion to remand the case to state court and KPERS' motion for reconsideration on issues relating to the statute of limitations.

On October 5, 1995, Shook notified the parties that it had offered Judge Bartlett's daughter a permanent posi-

[7] KPERS appealed this ruling, we affirmed the injunction order. *KPERS v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063 (8th Cir. 1996).

tion commencing September 1, 1996. On October 16, 1995, two days before the scheduled hearing, KPERS filed a motion requesting that Judge Bartlett disqualify himself, asserting the Blackwell, Boatmen's, and Shook employment issues. Defendants opposed the motion, stating that KPERS had filed the motion as a dilatory tactic to prevent the case from moving forward. The district judge postponed the hearing and denied KPERS' motion to disqualify on December 5, 1995.

On December 7, KPERS filed this petition, seeking a writ of mandamus ordering Judge Bartlett to disqualify himself from this case. KPERS also filed a motion to stay the district court proceedings pending our decision on the mandamus petition. After hearing oral arguments, we denied the motion for the stay. During the time between oral arguments and our decision on the petition, Judge Bartlett's daughter withdrew her acceptance of the associate position at Shook, deciding to reside and obtain employment in another city. We now decide the petition for a writ of mandamus.

II.

KPERS lists three reasons supporting its claim that Judge Bartlett should disqualify himself: (1) Boatmen's is the plaintiff in a separate, but related, declaratory judgment action against KPERS, and Judge Bartlett owns stock in the parent company of Boatmen's; (2) Blackwell has performed estate planning work for Judge Bartlett, has probated the estate of Judge Bartlett's deceased father, and is probating the estate of the judge's late mother, which will include the closing of a trust of which Judge Bartlett is the trustee; and (3) Judge Bartlett's daughter had accepted during the pendency of this litigation defendant Shook's offer of employment as an associate attorney. KPERS contends that, separately, each of these facts mandates disqualification under either 28 U.S.C. §§ 455(b)(1), 455(b)(5)(iii), or 455(a). KPERS fur-

ther argues that these facts cumulatively create an appearance of impartiality such that disqualification is necessary under § 455(a).

Defendants oppose the petition for the writ, arguing that KPERS brings this petition purely as a tactical move to delay the district court's consideration of the case and to avoid the pending decision on defendants' motions for summary judgment on the remanded statute of limitations issue. Defendants also argue that any alleged interest Judge Bartlett has in this case is too speculative to fall within the purview of § 455(b)(5) and that no person who knows the facts and circumstances of this case would reasonably question Judge Bartlett's impartiality.

A.

The issue of recusal is before us on petition for a writ of mandamus.

> The writ of mandamus is an extraordinary remedy that should be utilized only in those 'exceptional circumstances . . . amounting to a judicial usurpation of power.' A federal court may issue a writ of mandamus only when the appellant has established a 'clear and indisputable right' to the relief sought, the court has a nondiscretionary duty to honor that right, and appellant has no other adequate remedy.

Perkins v. General Motors Corp., 965 F.2d 597, 598-99 (8th Cir.) (quoting *In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986)) (alteration in original) *cert. denied*, 113 S. Ct. 654 (1992).

Our determination of whether an "indisputable and clear right" exists must take into consideration the discretion entrusted in the district court in deciding disqualification matters. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) ("An appellate court's power to issue a writ of mandamus upon a claim of wrongful refusal to recuse is inextricably related to the

scope of review over the district court's determination."), *cert. denied sub nom, Milken v. S.E.C.*, 490 U.S. 1102 (1989). In this circuit, whether disqualification is required in a particular case is committed to the sound discretion of the district judge, and we review only for an abuse of that discretion. *Perkins v. Spivey*, 911 F.2d 22, 33 (8th Cir. 1990), *cert. denied*, 499 U.S. 920 (1991). This is so because

> [t]he judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion. In deciding whether to recuse himself, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case.

In re Drexel, 861 F.2d at 1312. Accordingly, we presume Judge Bartlett is impartial, and KPERS bears "the substantial burden of proving otherwise." *Pope v. Federal Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992).

Considering together the mandamus standard and the abuse of discretion standard, the pivotal inquiry for determining whether KPERS asserts a clear and indisputable right to recusal and whether the district court had a nondiscretionary duty to honor that right is whether Judge Bartlett abused his discretion by refusing to disqualify himself from this case. In pursuing this inquiry, we must bear in mind that a writ of mandamus is an extraordinary remedy requiring a showing of exceptional circumstances. Because we ultimately conclude that the petition is a last hour tactical move as to the Boatmen's and the Blackwell matters and that the district court's decision not to recuse does not amount to an abuse of discretion on any of the issues, we do not address the question of whether another adequate remedy exists.

B.

Title 28, U.S.C. § 455 dictates the circumstances in which a judge must disqualify himself in a proceeding.

Subsection 455(a) requires a United States judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Under § 455(a), we consider whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case. *Lunde v. Helms,* 29 F.3d 367, 370 (8th Cir. 1994), *cert. denied,* 115 S. Ct. 1111 (1995); *United States v. Poludniak,* 657 F.2d 948, 954 (8th Cir. 1981), *cert. denied sub nom, Weigland v. United States,* 455 U.S. 940 (1982). The words of the Senate Judiciary Committee, in recommending what became § 455(a) under the 1974 amendments to § 455, provide guidance for judges who must decide whether to disqualify themselves under § 455(a):

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in [§ 455(a)] should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

S. Rep. No. 93-419, 93d Cong., 1st Sess. 5 (1973) (quoted in 13A Wright, Miller & Cooper, *Federal Practice and Procedure: Juris 2d* § 3549, at 623-24). Unlike objections under § 455(b), § 455(a) objections can be waived after a court gives full disclosure of the grounds for disqualification. 28 U.S.C. § 455(e).

Subsection 455(b) spells out the circumstances in which a judge must disqualify himself because of his relation to participants in a case. The specific provisions at issue here are § 455(b)(1), which requires a United States judge to disqualify himself from a case if "he has a personal bias or prejudice concerning a party," and § 455(b)(5)(iii), which requires recusal if the judge "or a person within the third degree of relationship to [him] . . . [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." The interest described in § 455(b)(5)(iii) includes noneconomic as well as economic interests. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1113 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). Subsection 455(e) provides that a § 455(b) conflict cannot be waived.

C.

At the outset, we choose to address the defendants' argument that KPERS brought both its district court motion to disqualify and this petition for mandamus as a part of a strategic and tactical plan to delay and prevent the district judge from ruling on the pending summary judgment motions following our July 27, 1995, ruling reversing the district court's decision that a ten-year Kansas statute of limitations applied. After a thorough review of the record, we agree with defendants as to the Blackwell and Boatmen's matters and find the petition as to those matters to be untimely. With regard to Shook, we believe defendants' argument has merit, but we ultimately decline to find the petition untimely on that issue.

After our ruling that the ten-year Kansas statute of limitations does not apply to this case, KPERS undertook a flurry of actions which occupied the district court's time to the detriment of the efficient resolution of this case. As noted above, it filed a motion to have the court reconsider its April 1994 ruling regarding KPERS' proprietary capacity, it filed duplicative suits in Kansas state court necessitating the issuance of preliminary injunctions

against it, and it filed a third motion to remand the case to Kansas state court. In his order of October 25, 1995, on the renewed motion to remand, the district judge noted that "[s]ince the Eighth Circuit Court of Appeals' decision on July 27, 1995, KPERS has taken a number of steps, including the filing of this motion, to delay the expeditious resolution of this case." (App. Pet'r at 359.) When we affirmed the temporary injunctions prohibiting KPERS from pursuing the duplicative state court suits it filed after our July 27, 1995, statute of limitations decision, we noted that KPERS' purpose in filing the duplicative state suits was to obtain a favorable decision in the Kansas courts on the same statute of limitations issue we had already decided. We found the district court's finding that, by filing the duplicative state suits, KPERS had merely tried to " 'carve up what was one case into separate cases with separate claims, all leading to a subversion of the RTC's right to remove the entire case' " to be fully supported by the record and not clearly erroneous. *KPERS v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063, 1070 (8th Cir. 1996).

The basic underlying facts concerning Judge Bartlett's stock ownership in Boatmen's parent company and his existing relationship with Blackwell's probate and tax lawyers were known to KPERS for over a year before it filed its petition for mandamus with us. On December 16, 1994, it asked for and received a ruling from Judge Bartlett on its then pending recusal request which had asserted the Blackwell and Shook matters. KPERS sought no relief from Judge Bartlett's denial of the request. Instead, as noted above, it embarked on full-scale trial preparation, knowing all along of the trial judge's stock holdings in Boatmen's parent company and the existence of the related suit against it by Boatmen's, filed December 12, 1994, pending before Judge Whipple and of any potential for collateral effect it now asserts. It waited nearly a year after Judge Bartlett disclosed his stock holdings before raising any objection about them. Although Black-

well was allowed to intervene by our July 27, 1995, decision, and although KPERS had first asserted its objection about Blackwell the previous November, it waited until two days before the scheduled October 18, 1995, hearing on its renewed motions to remand and to reconsider the question of its proprietary capacity, to again seek the judge's recusal based on the Blackwell matters. Our review of KPERS' pattern of conduct leads us to the conclusion that the defendants' allegation that KPERS' recusal motion and this petition were filed for tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge, is correct. "In the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns." *In re Cargill, Inc.*, 66 F.3d 1256, 1262-63 (1st Cir. 1995). *See also In re Int'l Business Machines Corp.*, 45 F.3d 641, 643 (2d Cir. 1995) ("[A] prompt application avoids the risk that a party is holding back a recusal application as a fall back position in the event of adverse rulings on pending matters.").

We have held in the past that even though § 455 has no express timeliness requirements, claims under § 455 will not be considered unless timely made. *Holloway v. United States*, 960 F.2d 1348 (8th Cir. 1992); *see Oglala Sioux Tribe v. Homestate Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983) ("Although § 455 does not include an explicit time limitation, we believe that a timeliness requirement is appropriate . . . ."); *United States v. Bauer*, 19 F.3d 409, 414 (8th Cir. 1994) ("This court has held that claims under § 455 'will not be considered unless timely made.' ") (quoting *Holloway*).

We are aware that a recent panel which exercised its authority to reassign a case on remand to a different trial judge pursuant to 28 U.S.C. § 2106 pointed out that both *Holloway* and *Bauer* were § 455(b) cases alleging actual bias. *United States v. Jim Guy Tucker*, 78 F.3d 1313 (8th Cir. 1996). *Oglala Sioux*, however, which predates

both *Holloway* and *Bauer,* involved both § 455(a) and (b) claims and imposed a timeliness requirement upon both. *Tucker,* resting primarily on the exercise of this court's supervisory powers under 28 U.S.C. § 2106, specifically holds that a § 2106 request must be timely made and that a § 2106 request made in an appellate brief satisfies § 2106's timeliness requirement. Because it was not necessary for the *Tucker* panel to determine whether § 455(a) has a timeliness requirement attached to it in order to determine whether the Independent Counsel's § 2106 request was timely, we believe the panel's comments, to the extent they can be construed to indicate that there is no timeliness requirement for § 455(a) challenges, are not controlling in this case.

Our reading of *Oglala Sioux, Holloway, Bauer,* and *In re Apex Oil Co.,* 981 F.2d 302 (8th Cir. 1992), tells us that our circuit has consistently required timely action as to § 455 in general, i.e., as to both (a) and (b). We subscribe to the view that motions to recuse should not "be viewed as an additional arrow in the quiver of advocates in the face of [anticipated] adverse rulings." *TV Communications Network, Inc. v. ESPN, Inc.,* 767 F. Supp. 1077, 1081 (D. Colo. 1991). We hold that KPERS' petition for a writ of mandamus is untimely as to the Boatmen's and Blackwell matters, that it is interposed for suspect tactical and strategic reasons, and that it can and should be denied for these reasons alone.

We also believe the timing of KPERS' petition as to Judge Bartlett's daughter's then prospective employment at Shook is suspect. When the judge disclosed in November 1994 his daughter's summer associate position with Shook, KPERS noted its concerns in a letter to the court, arguing that summer employment created a conflict because such positions often ripen into permanent positions. At that point, although KPERS expressed its concerns, KPERS felt an objection would be premature until Shook was actually a party in the case. Three days later, in a

November 21, 1994, letter, KPERS changed its stance and actually objected to the conflict. The court declined to disqualify himself, stating that he was persuaded by KPERS' original position that disqualification would be premature until Shook was indeed a party in this case.

Approximately one month later, in December 1994, Shook was allowed to intervene. Instead of renewing its motion, KPERS engaged in full-blown discovery for the next ten months and gave no indication that it was concerned about Judge Bartlett's impartiality during that time. For example, KPERS filed an amended complaint against Shook and made no mention of any conflict of interest. KPERS also deposed Shook's witnesses and disclosed five experts it intended to have testify against Shook. In mid-October 1995, after we issued an opinion that may render KPERS' cause of action against Shook untimely under the relevant statute of limitations, KPERS finally complained about the alleged conflict involving Judge Bartlett's daughter.

Given these facts, we believe KPERS' argument regarding Shook may be tainted with the same tactical motives as the arguments regarding the alleged conflicts with Blackwell and Boatmen's. Nonetheless, we note the factual development occurring in October 1995—Ms. Mook's acceptance of Shook's offer of permanent employment. Within two weeks of this development, and two days before a scheduled hearing on its renewed motions implicating the statute of limitations and seeking remand to state court, KPERS' alleged concern about Judge Bartlett's impartiality re-emerged. Because Ms. Mook's then prospective permanent employment at Shook at least altered the landscape slightly, we give KPERS the benefit of the doubt and do not find the request for disqualification untimely as to the Shook matter.

D.

Although we hold the conflict issues involving Blackwell and Boatmen's to be untimely, we turn to the reasons advanced by KPERS for disqualification, addressing each specific contention regarding Boatmen's, Blackwell, and Shook, rsepectively.

KPERS' first contention centers on Judge Bartlett's financial interest not in Boatmen's itself, but in the parent company of Boatmen's. The judge indisputably has such an interest. Accordingly, he disqualified himself from presiding over Boatmen's motion to intervene, and when Boatmen's motion was later stayed and Boatmen's filed a separate, related declaratory judgment action, that case was not assigned to Judge Bartlett. The question here, however, is whether Judge Bartlett's ownership of stock in the parent company of Boatmen's constitutes a conflict of interest under § 455(b)(5)(iii) or (a) in *this* case, where neither Boatmen's nor its parent company is involved.

KPERS contends that a conflict exists because Judge Bartlett's rulings in this case may have a collateral effect upon issues in Boatmen's separate declaratory judgment action. The issues in Boatmen's declaratory judgment action arise out of Boatmen's separate and distinct contractual obligations as trustee under trust indentures covering the Home Savings debentures purchased by KPERS and are not presented in the case pending before Judge Bartlett. Apart from its general assertion that there are overlapping issues between the two cases, KPERS has not shown the identicality of the issues involved sufficient to indicate that Judge Bartlett's rulings in this case will, or are likely to, result in preclusive effect. While it is true that Boatmen's cited Judge Bartlett's decision concerning the proprietary nature of KPERS to Judge Whipple in resisting KPERS' Eleventh Amendment defense, Boatmen's did not assert the decision under a collateral estoppel theory, and Judge Whipple was certainly free to

come to a contrary conclusion. Having no specific allegation before us of a common remaining issue in the two separate cases, we do not view this case as one involving potential collateral estoppel.

KPERS also seems to argue that the possible persuasive authority of this case on the separate action brought by Boatmen's creates a § 455(b)(5)(iii) conflict. KPERS' argument essentially invites us to speculate on whether a district judge would decide issues in a case before him a particular way in hopes of persuading a different judge presiding over a separate case to reach the same decision. This speculation, as noted above, would not be based on any identified, remaining overlapping issue. We decline to accept KPERS' invitation to engage in such unsupported conjecture. We are confident that Judge Whipple will independently assess the merits of the arguments in the case before him. At best, Judge Bartlett's alleged financial interest in this case in these circumstances is simply too remote, speculative, and contingent to be "an interest that could be substantially affected by the outcome of the proceeding" before him. 28 U.S.C. § 455(b)(5)(iii).

Furthermore, we are reluctant to fashion a rule requiring judges to recuse themselves from all cases that might remotely affect nonparty companies in which they own stock. We believe such a rule would paint with too broad a stroke. By way of example, a judge holding stock in General Motors should not have to recuse from a case involving Ford Motor Company because some ruling he may make might be used as persuasive authority in a case against GM. *Cf. In re Placid,* 802 F.2d 783, 786-87 (5th Cir. 1986) (rejecting argument that recusal is required when judge owns stock in nonparty bank and case before him may have impact on banking industry). As a general matter, the administratively daunting task of identifying such tangential "interests" outweighs any benefit of eliminating the remote possibility of consequential bias.

The only authority KPERS cites to support its collateral estoppel argument is *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136 (6th Cir. 1990). In *Aetna*, seven separate cases were brought by the FDIC against Aetna. All of them were consolidated for trial. All of them involved the interpretation of the same provisions of Aetna's blanket banker's bond. Because the trial judge's daughter was a member of a law firm involved in four of the cases, the judge originally disqualified himself. His daughter had participated in depositions when the cases were consolidated. The trial judge later separated out for trial before him the three cases where his daughter's firm was not involved, and Aetna sought his recusal. A majority of the judges of the Sixth Circuit joined Judge Kennedy's concurring opinion holding that because his daughter had been involved in the consolidated cases, the trial judge should not have severed the cases for trial, and should have remained out of all the cases, relying on § 455(b)(5)(ii). KPERS draws up dicta in *Aetna*, stating that because a decision in any one of the cases might be used collaterally in all the rest, an additional reason for questioning the trial judge's impartiality existed. We do not find the *Aetna* dicta to be persuasive authority here, and our research has revealed no other authority for the proposition that a judge's interest in a nonparty company can create a conflict of interest mandating recusal under § 455(b)(5)(iii).

Given the facts of this case, we hold that KPERS has not carried its substantial burden of proving that Judge Bartlett's stock ownership in Boatmen's parent company creates a § 455(b)(5)(iii) conflict. *See Pope*, 974 F.2d at 985. KPERS has not proven that Judge Bartlett's stock ownership in the parent company of Boatmen's would be substantially affected by the outcome of this case where neither Boatmen's nor its parent is a party. *Cf. Oglala Sioux*, 722 F.2d at 1414 (holding that, in an action determining title to certain Black Hills property, the district

judge was not required to recuse because he owned property in the vicinity).

KPERS' claim that the judge's interest in Boatmen's parent company creates an apparent conflict under § 455(a) also fails. Judge Bartlett disclosed his ownership of stock in Boatmen's parent company on October 26, 1994. From that time until almost a year later, conferences were held in which the parties and the court discussed various aspects of this case. Not once during this period of time did KPERS question the court's appearance of impartiality due to the separate case involving Boatmen's. Considering these facts, an informed person would not now reasonably question Judge Bartlett's ability to preside fairly over this case because of his interest in a non-party company. An informed person might instead reasonably question the sincerity of KPERS' belated concern.

KPERS' second allegation of a conflict of interest concerns Judge Bartlett's relationship with Blackwell. As we noted above, Judge Bartlett disclosed to all of the parties in October 1994, when Blackwell sought to intervene, that probate and tax lawyers in Blackwell had rendered legal advice and services to him both for his personal estate planning and in the probate of his parents' estates. He informed them that while the work was nearly done, some matters remained to be completed and that his mother's estate remained open and Blackwell's representation was continuing as to the estate. He offered each party the opportunity to object to his continued handling of the case. KPERS made no objection, and in fact has acknowledged that it not only made no objection, but it expressly waived any such conflict. *See* KPERS letter of November 18, 1994, App. Pet'r at 195 ("Previously, we expressed no objection to Judge Bartlett's continued role as judge in this litigation by reason of his involvement with the estate and probate attorneys at Blackwell Sanders."), and Pl.'s Supp. Resp. to the Pets. to Intervene at 14, n.6 ("Even though KPERS expressly waived the Blackwell Sanders conflict . . . .").

Despite its previous express waiver, and its admissions against its own interests that it "did not believe that Judge Bartlett's involvement with the Blackwell firm [by itself] warranted significant concern," KPERS now argues that Judge Bartlett should be disqualified because of his involvement with the Blackwell probate and tax lawyers under both § 455(a) and (b)(1) (a judge should disqualify himself "where he has a personal bias or prejudice concerning a party . . . ."). We believe the § 455(a) objection has been expressly waived by KPERS, and we are not persuaded that Judge Bartlett's role as a trustee of his late mother's real estate trust (the closing of which was part of the probate matters handled by Blackwell) requires a different result. What is important is that the relationship between Judge Bartlett and Blackwell and the fact that some matters remained to be fully completed were disclosed and any potential conflict waived.

With respect to the § 455(b)(1) actual personal bias or prejudice challenge, KPERS points to no specific instances where Judge Bartlett has demonstrated bias or prejudice in favor of Blackwell. *See Liteky v. United States,* 114 S. Ct. 1147, 1155 (1994) (distinguishing between the reality of bias or prejudice prohibited by § 455(b)(1) and the appearance of bias prohibited by § 455(a)). Instead, it relies upon the nature of the relationship discussed above. If KPERS was concerned that Judge Bartlett had a personal bias or prejudice in favor of Blackwell, that concern would have been triggered by the judge's initial disclosure in October 1994, of his then existing involvement with some of Blackwell's lawyers. While it is true that a § 455(b)(1) objection cannot be waived, it is still subject to the timeliness requirement of our cases. Here, Blackwell was permitted to intervene by our July 27, 1995, decision, and yet KPERS waited until October to raise the issue it had known about for a year. This delay, considered in the light of the numerous activities KPERS then engaged in, such as the filing of additional actions in Kansas, gives us substantial reason

to conclude that the present challenge was tactically motivated and untimely, and we so hold.[8]

Next, we address KPERS' third allegation of a conflict —Judge Bartlett's daughter's prospective employment with Shook. Although Ms. Mook recently withdrew her acceptance of Shook's offer of employment, Judge Bartlett presided over this case and rendered at least two decisions denying reconsideration of previously decided issues before Ms. Mook's withdrawal of her acceptance.[9] We therefore address this issue on the merits.

We begin our analysis on this issue by observing that an employment relationship between a party and a judge's son or daughter does not *per se* necessitate a judge's disqualification. *See Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 871 (9th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556, 1568 (Fed. Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990). Rather, the de-

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[8] KPERS also asserts that because Judge Bartlett is a former partner of Blackwell, his impartiality appears to be questionable. We first note that Judge Bartlett has had no opportunity to respond to this argument, because KPERS did not raise this issue below. Second, we question KPERS' assertion that its Kansas City attorneys did not know of Judge Bartlett's prior affiliation with Blackwell, a Kansas City firm, and in any event, the information was easily accessible. *See* Almanac of the Federal Judiciary, vol. 1, at 41 (1995). Finally, Judge Bartlett terminated his partnership with Blackwell when he was appointed to the bench in 1981. In our view, the intervening 15 years are sufficient to erase any appearance of partiality stemming from his prior firm membership.

[9] We note that subsection (f) of § 455 provides a procedure by which a conflict stemming from a financial interest in a party may be cured, as long as that interest would not be substantially affected by the outcome of the case. Because Judge Bartlett presided over the case and rendered decisions after the alleged conflict appeared or was discovered, we do not believe § 455(f) is applicable to this case, if indeed it covers a § 455(b)(5)(iii) conflict, a question on which we do not comment.

termination of whether a conflict exists in a given situation is factually bound.

Upon careful review of these facts, we do not find an actual conflict under § 455(b)(5)(iii). First, Ms. Mook was not and would not, as a future employee of Shook, be involved in the present litigation. *Cf. Hunt v. American Bank & Trust Co. of Baton Rouge,* 783 F.2d 1011, 1016 (11th Cir. 1986) ("We do not believe that a law clerk's acceptance of future employment with a law firm would cause a reasonable person to doubt the judge's impartiality so long as the clerk refrains from participating from the cases involving the firm in question."). Second, the actual employment relationship between Shook and Ms. Mook was not to ripen until September 1996. As the facts of this case demonstrate, many circumstances can change during the intervening period between the time a law student accepts an offer to work as an associate and the time the student graduates and actually goes to work. Third, Ms. Mook was to be a salaried employee with traditional employee benefits, not a partner whose income is directly related to the profit margin of the firm and could be substantially affected by the outcome of this case. *See Potashnick,* 609 F.2d at 1113 (distinguishing a partner's interest in a case from a salaried associate's interest); *United States ex rel. Wienberger v. Equivfax Inc.,* 557 F.2d 456, 463-64 (5th Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978) (same). In addition, Shook is only one of a number of defendants; if KPERS prevails, Shook's share of the damages would likely be covered by the insurance the briefs show it has and almost certainly not affect the salary or benefits of a first-year associate. Given these facts and the contingencies they create, we find it extremely unlikely that any loss Shook could suffer in this case would trickle down to Ms. Mook. We therefore find that Ms.Mook did not have a financial interest in this case. Moreover, Ms. Mook's personal future was not dependent on Shook's success or failure, as her credentials evidently place her in a position where she could

obtain employment with other law firms. We therefore reject KPERS' assertion that Ms. Mook has any other interest in Shook that could be substantially affected by the outcome of this case. *Cf. Wienberger,* 557 F.2d at 463-64 (holding that when judge's son is an associate with law firm representing defendant, but is not actively participating in the case, judge need not recuse himself), *cert. denied,* 434 U.S. 1035 (1978).

KPERS' argument that Ms. Mook's employment with Shook creates an apparent conflict under § 455(a) is a more difficult issue, for even if no actual conflict exists, we must be confident that an informed person would not reasonably believe the judge's impartiality was compromised. Upon careful review of this entire record, however, we believe KPERS has failed to show that a denial of a motion to recuse under these facts would be an abuse of discretion, and keeping in mind the procedural context of this case, we do not believe KPERS has made the showing necessary to warrant the extraordinary remedy of a writ of mandamus. We again note that we view this situation through the eyes of a reasonable person informed of all the facts of this case, including: (1) that Ms. Mook has not and will not be personally involved in this litigation; (2) that in KPERS' first motion for recusal, which the judge denied, KPERS viewed summer employment as the equivalent of permanent employment because the former often ripens into the latter, and consequently there is little in the way of changed circumstances to support the present challenge; (3) that KPERS did not even challenge Judge Bartlett's ruling on KPERS' first Shook objection; (4) that during the next ten months, including the summer of Ms. Mook's employment with Shook, KPERS approached the pretrial litigation with Shook in the case as a party as if no conflict existed; (5) that prior to his decision on the recusal motion, no one, including KPERS, suggests that Judge Bartlett exhibited any apparent personal bias for or against any party; (6) that when KPERS' second challenge of the potential conflict finally emerged,

it appeared only after KPERS was facing a potentially fatal decision on a motion for summary judgment; (7) that Ms. Mook was not actually employed with Shook at the time KPERS brought this petition; and (8) that Ms. Mook had accepted an offer to join the firm prospectively only as a first-year, salaried associate, not a partner with substantial interests in the profit margin of the firm. Considering all of this, as well as the procedural history we traced in Section I of this opinion, we do not believe KPERS has provided us with the necessary showing that an informed person would question the judge's impartiality, particularly when it is now clear that Ms. Mook will not be employed by Shook at all.

Finally, KPERS argues that all of these facts cumulatively create an appearance of a conflict of interest in violation of § 455(a). To the contrary, considering all of the facts and the procedural context of this case, including KPERS' delay and motivation, the big picture reveals to a reasonable person a complex case involving an inordinate number of pretrial motions, an underlying struggle between the parties to determine the choice of forum, a tactical move made by a party who fears a looming adverse decision, and an experienced district judge who is attempting to efficiently resolve the case.

III.

Because we find KPERS' petition to be untimely as to the Blackwell and Boatmen's challenges, and because none of KPERS' allegations meet the substantial showing necessary to establish a clear and indisputable right to recusal and a nondiscretionary duty on the district judge to disqualify himself, we deny the petition for a writ of mandamus.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
OCT 15 1996
OFFICE OF THE CLERK

No. 96-113

IN THE

Supreme Court of the United States

October Term, 1996

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., RONALD REIMER, KENNETH H. KOGER, CLIFFORD W. SHINSKI, BRENT MESSICK, ROBERT CREW, SHERMAN DREISESZUN, LELAND GERHART, I. I. OZAR, RAYMOND GIFFORD, HARRY S. JONAS, RANDALL M. NAY, FRANK SEBREE, TONY SALAZAR, PHILIP PISTILLI, MICHAEL K. RUSSELL, GAGE & TUCKER, PEAT, MARWICK, MITCHELL & CO., KPMG PEAT MARWICK, ROBERT SPENCE, THOMAS S. MORGAN, co-executor of the estate of FRANK S. MORGAN, MARILYN J, co-executor of the estate of FRANK S. MORGAN, ISABEL A. KIENE, executrix of the estate of RALPH E. KIENE, SHOOK, HARDY & BACON, C. PATRICK McLARNEY, substituted for SHOOK HARDY law firm, BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

KPERS hereby replies to the arguments raised by respondents in support of the decision below and to respondents' claim that KPERS' petition should be denied on mootness grounds.

1. On the first question presented, whether 28 U.S.C. § 1367 supplemental jurisdiction decisions involve issues of subject-matter jurisdiction, or instead are completely insulated from review even in the face of an abuse of discretion, respondents' efforts to deny the existence of any conflict in the circuits are wholly unavailing.

The Eighth Circuit has held that under Section 1367 it is totally irrelevant — and *unreviewable* — whether a "district court abused its discretion in retaining the case" after the initial basis for federal jurisdiction is lost. Pet. App. 7a. It has also noted that the law of the Seventh and D.C. Circuits is in "conflict with" and "inconsistent with" its decision and its own interpretation of this Court's precedents. For example, the Seventh Circuit has explicitly held that, where the federal claim is dismissed before trial, the relevant analysis "is jurisdictional" and "we are obligated to raise it ourselves." *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 & n.4 (7th Cir. 1987). Respondents also ignore that this specific holding of *Maguire* was recently adopted by the full D.C. Circuit in *LaShawn A. v. Barry*, 87 F.3d 1389, 1397 n.10 (D.C. Cir. 1996) (en banc).

Thus, the supplemental jurisdictional issue presented here is an important and recurring aspect of federal procedure, and the conflict over it warrants this Court's review. "On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility." R. Stern, et al., *Supreme Court Practice* § 4.15, at 191-92 (7th ed. 1993) ("Stern"). Thus, the only ground on which to deny certiorari would be if this case were a poor vehicle for addressing the conflict.

On this score, respondents claim that KPERS "attacks dicta only, as it ignores the principal, independent basis for the Eighth Circuit's decision: arising-under jurisdiction under 12 U.S.C. § 1441a." Peat Marwick Opp. 6; *see also* Reimer & Koger Opp. 11 (arguing that supplemental jurisdiction ruling "was purely academic.").

Respondents have it backwards; it is the language *they* emphasize that appears not to be a holding. As indicated by the Eighth Circuit's language immediately preceding the passage quoted

in Peat Marwick Opp. 6, all that can be determined with any certainty is that in discussing the arising-under jurisdiction point, the Eighth Circuit was recounting the fact "that the district court articulated two theories to justify its refusal to remand the case." Pet. App. 6a. The remainder of the paragraph, which respondents claim is a holding by the Eighth Circuit, is consistent with a mere description of *the district court's holding* on this point; the Eighth Circuit does not unambiguously hold against KPERS on this ground. As we have stated, the evident meaning of these few lines of text is that "[t]he Eighth Circuit briefly suggested that this Section 1367(c) issue could be avoided by construing Section 1367 as simply inapplicable in a case like this." Pet. 11 n.10. Indeed, in the rest of its analysis, the Eighth Circuit explicitly "limit[ed] [its] analysis to supplemental jurisdiction." Pet. App. 6a. Respondents' assertion that the passing reference to arising-under jurisdiction is actually the "principal holding" rather than a "brief suggestion," Peat Marwick Opp. 7 n.8, ignores this language setting out a narrow scope of analysis.[1]

In any event, even if the few lines of the Eighth Circuit's decision on the arising-under jurisdiction point constitute a holding, that does not mean that the next two paragraphs in the Eighth Circuit's decision concerning the nature of Section 1367 supplemental jurisdictional rulings (*see* App. 6a-7a), are dicta. At minimum, these two paragraphs, the basis of KPERS' first question presented, constitute an alternative holding. *See, e.g., Woods v. Interstate Realty Co.*, 337 U.S. 535, 5337 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum"); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (rejecting argument that one ground for decision "should be disregarded, because [of] . . . a second ground for [the

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[1] One opposition claims that in the few lines touching on the arising-under jurisdiction point, "the Eighth Circuit was merely reaffirming its previous decision on the same point." Reimer & Koger Opp. 9; *see also id.* at 10, 13. But the decisions cited do not support this claim; the subject-matter jurisdiction issue was not involved in those narrow interlocutory appeals. Nor is there anything to the claim that we raise an "untimely challenge" on the subject-matter jurisdiction issue because KPERS did not appeal the issue until its first opportunity to appeal as of right, when a preliminary injunction was imposed. *See* Peat Marwick Opp. 9 & n.11.

court's] decision which was broad enough to sustain it independently of the first ground."). This holding should be reviewed, as it will remain the law of the Eighth Circuit, in conflict with the law of other circuits, unless and until this Court grants certiorari on the issue.

Further, and again assuming for purposes of argument that the arising-under jurisdiction theory is actually a holding, there is nothing to respondents' claim that "[t]he petition does not challenge" the holding, so that granting review of KPERS' first question presented "could have no effect on this case." Peat Marwick Opp. 6-7 (footnote omitted). In fact, the petition *does* challenge the arising-under jurisdiction theory, arguing that it can be readily dispensed with as a "minor feature" of the analysis under our second question presented. Pet. 11 n.10. "[E]lementary principles of statutory interpretation," we observed, applied in conjunction with principles of comity, require that the Section 1367(c) framework — addressing the disposition of a case where the initial basis for federal jurisdiction disappears — should control in all such situations. Construing Section 1367(c) as providing the exclusive tool for addressing situations where the original basis of federal jurisdiction has been lost is consistent with its language and would prevent strained constructions of other statutes like the one advocated in this case, under which respondents would vest jurisdiction of a case like this in the federal courts forever, despite the meritless nature of the third-party claims used to hijack the case into federal court to begin with. *Id.*[2]

Of course, we need not demonstrate that this arising-under jurisdiction issue — assuming that it does constitute a holding — is

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[2] It is worth noting, for example, that the RTC removal statute relied on by respondents merely states that *only* a "civil action, suit or proceeding to which the [Resolution Trust Corporation] is a party shall be deemed to arise under the laws of the United States," as to which "district courts shall have original jurisdiction." 12 U.S.C. § 1441a(*l*)(1) (quoted in Reimer & Koger Opp. at 2). The cases cited by respondents concerning this statute (*see* Peat Marwick Opp. 7 n.7) merely support the view that *during the time that the RTC is actually a party* to an action, original jurisdiction exists over the entire action. Once the action becomes one as to which the RTC *is not* a party, the issue becomes whether federal jurisdiction should *continue*. On this issue, 28 U.S.C. § 1367(a) controls, "[e]xcept as . . . expressly provided otherwise by Federal statute" (no express provision for this situation is found in the RTC removal statute), and 28 U.S.C. § 1367(c) provides guidance concerning whether or not supplemental jurisdiction should be declined.

independently certworthy. We need only demonstrate some prospect of prevailing on the issue under our analysis of the second question, so that KPERS has a stake in the grant of certiorari.

2. On the second question, respondents assert that we "improperly seek[] an advisory opinion." Peat Marwick Opp. 11. But a decision by this Court construing Section 1367(c) in light of abstention and other comity principles would in no sense be advisory. Rather, it would bear directly on the question whether the district court abused its discretion in refusing to remand this case and in thereby rewarding respondents for bringing meritless claims against the RTC in order to force the State of Kansas to bring its civil fraud and other claims in federal court. Pet. 13-14. Consistent with respondents' view (*see* Peat Marwick Opp. 12 n.16), we also stated that "we would not expect this Court itself" to perform a plenary analysis in the first instance, and thus we suggested that this Court clarify the relevance of abstention and other comity principles in construing Section 1367(c), and then remand the case. Pet. 15.

Respondents also argue that abstention principles simply "are not relevant" to discretionary decisions about supplemental jurisdiction. Reimer & Koger Opp. 13-14. We submit that the views of Justice Powell, late Solicitor General Lee, and Professor Shapiro, *see* Pet. 15, provide ample room for debate on this point. Finally, and more narrowly, respondents take issue with KPERS' specific analysis of the relevance of *Younger* abstention to this case, *see* Peat Marwick Opp. 11; Reimer & Koger Opp. 14, and they also argue that "exercising supplemental jurisdiction was not an abuse of discretion under the peculiar circumstances of this case." Peat Marwick Opp. 8; *see also id.* at 10. As part of this strategy, they set forth a distorted view of the case that belittles the sovereign interest of the State of Kansas and impugns KPERS' integrity.[3] Such points have

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[3] For example, respondents suggest that KPERS is misrepresenting this litigation as revolving around state-court fraud claims that are traditionally litigated in state court and that the State of Kansas could prosecute criminally, *see* Reimer & Koger Opp. 5; Peat Marwick Opp. 5, even though KPERS' description of the litigation is obviously correct. *Compare* Pet. 4, 14, *with KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614, 615 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994) (this litigation involves "various allegations of fraud, breach of fiduciary duty,

no bearing on whether certiorari should be granted and are not even relevant to the merits of the issues in this case.

3. Respondents' final argument is that certiorari should be denied on mootness grounds because five days after the petition was filed, the district court — at respondents' urging — replaced the preliminary injunction with a permanent injunction. *See* Reimer & Koger Opp. at 10, 18-19; Peat Marwick Opp. 2 & n.2, 13. We certainly question whether the district court's granting of a request "that . . . the preliminary injunction . . . be made permanent," Reimer & Koger App. 30a — which it did after restating *exactly* the same findings relevant to jurisdictional and other matters that supported the preliminary injunction, *id.* at 31a-32a — creates mootness.

If the case were moot, however, it would appear that the proper remedy would be to vacate what would then be an unreviewable decision below. The established practice, of course, is to vacate any judgment "which has become moot while on its way here or pending our decision on the merits." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). *See also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390-93 (1994); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3533.10, at 433-34 (1984); *id.* at 324 (Supp. 1996). Respondents suggest that vacatur is appropriate only if this Court would have granted certiorari absent mootness. Peat Marwick Opp. 13 (citing Stern, *supra*, *Supreme Court Practice* § 18.5, at 724). But the controlling *Bonner Mall* decision requires vacatur "when mootness results from unilateral action of the party who prevailed below," 115 S. Ct. at 392, as is the case here given that it was *respondents* who moved for a permanent injunction. Respondents' suggestion that this Court should base any vacatur decision on an assessment of the certworthiness of this case is also foreclosed by *Bonner Mall*, which established "the inappropriateness of disposing of cases, whose merits are beyond judicial power to consider, on the basis of judicial estimates regarding their merits." *Id.* at 393.

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professional negligence, and gross negligence"). Similarly, respondents accuse KPERS of "grossly misleading" this Court about the RTC's post-dismissal lack of interest in a federal forum, Peat Marwick Opp. 5, even though KPERS simply quoted what the RTC's counsel stated for the record. Pet. 6 n.5.

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted.

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